

THE ARMY LAWYER

Headquarters, Department of the Army

Department of the Army Pamphlet 27-50-221

May 1991

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The Army Lawyer (ISSN 0364-1287)

Editor

Captain Daniel P. Shaver

The Army Lawyer is published monthly by The Judge Advocate General's School for the official use of Army lawyers in the performance of their legal responsibilities. The opinions expressed by the authors in the articles, however, do not necessarily reflect the view of The Judge Advocate General or the Department of the Army. Masculine or feminine pronouns appearing in this pamphlet refer to both genders unless the context indicates another use.

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The Army Lawyer articles are indexed in the *Index to Legal Periodicals*, the *Current Law Index*, the *Legal Resources Index*, and the *Index to U.S. Government Periodicals*.

Individual paid subscriptions are available through the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402.

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Issues may be cited as *The Army Lawyer*, [date], at [page number].

Second-class postage paid at Charlottesville, VA and additional mailing offices. **POSTMASTER:** Send address changes to The Judge Advocate General's School, U.S. Army, Attn: JAGS-DDL, Charlottesville, VA 22903-1781.



DEPARTMENT OF THE ARMY
OFFICE OF THE JUDGE ADVOCATE GENERAL
WASHINGTON, DC 20310-2700



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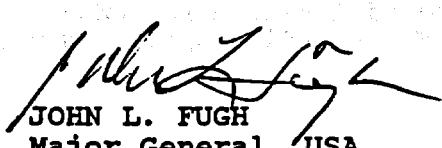
DAJA-ZA

29 March 1991

MEMORANDUM FOR STAFF AND COMMAND JUDGE ADVOCATES

SUBJECT: Participation in Contract Appeals - POLICY
MEMORANDUM 91-1

1. The provision of legal advice to the Directorate of Contracting and other personnel involved in the acquisition of the Army's goods and services is one of our most significant legal missions. It is your responsibility, as the supervisor of your office, to ensure that sufficient resources and management attention are directed toward this increasingly important requirement.
2. Contract Appeals Division (CAD) reports that many of the Rule 4 files required by the Armed Services Board of Contract Appeals (ASBCA) Rule 4 and Trial Attorney's Litigation Files (TALFs) contain errors and thus fail to conform to the guidance contained in AFARS Part 33 and Appendix A, and the CAD publication, "Preparing the Rule 4 File and the Trial Attorney's Litigation File." Many of the reported errors stem from lack of oversight and review. Although the Directorate of Contracting is responsible for preparing these important documents, you, as the supervisory legal officer, also have a critical role to play in ensuring that once these files are compiled, they are reviewed by your contract legal advisor for administrative regularity.
3. Your participation in the acquisition process is an area of interest and concern to me, and I challenge each of you to institute office procedures that strengthen the coordination between the Directorate of Contracting and your office. I also expect that you will personally ensure that Rule 4 Files and TALFs are reviewed by your contract legal advisor prior to dispatch to the ASBCA and CAD.


JOHN L. FUGH
Major General, USA
Acting The Judge Advocate
General



REPLY TO
ATTENTION OF

DAJA-ZX

DEPARTMENT OF THE ARMY
OFFICE OF THE JUDGE ADVOCATE GENERAL
WASHINGTON, DC 20310-2700



16 April 1991

MEMORANDUM FOR Staff and Command Judge Advocates

SUBJECT: Relations With News Media - POLICY MEMORANDUM 91-2

1. The events of DESERT SHIELD/STORM remind us that Army policy on release of information to the news media requires periodic emphasis. Through full coordination, I am confident that we can provide accurate information, properly balance the Army's interests with the public's "right to know," and, in matters of military justice, minimize risks to an individual's trial rights. To meet these objectives, all judge advocates should have working knowledge of--

a. Army policies on release of information (AR 25-55, para. 5-101d).

b. Ethical considerations regarding trial publicity (DA Pamphlet 27-26, Rules of Professional Conduct for Lawyers, Rule 3.6).

2. Normally, the public affairs office (PAO) of your command will answer all news media inquiries. You should--


a. Establish local procedures with your PAO for handling media inquiries concerning legal matters.

b. Ensure that the PAO looks to you personally as the source of information concerning legal matters.

c. Ensure that individual counsel are not placed in the position of speaking for the command, or explaining the results of a court martial.

3. Generally, no member of your office should, without your approval, prepare a written statement for publication or permit himself or herself to be quoted by the media on official matters within the purview of your office. Similarly, unless first cleared through the Executive, neither you nor any member of your office should be interviewed by, or provide statements to, representatives of the media on issues or subjects having Army-wide, national or international implications.

4. Personnel assigned to the U.S. Army Trial Defense Service (USATDS) will handle responses to news media in accordance with the USATDS standing operating procedures.


JOHN L. FUGH
Major General, U.S. Army
Acting The Judge Advocate
General

Maiming as a Criminal Offense Under Military Law

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Introduction

Maiming¹ is a serious offense that rarely is prosecuted in military courts. From 30 June 1986, through 29 January 1990, only thirty-two specifications alleging maiming were tried in the Army at general or special courts-martial.² Of these cases, the accused providently pleaded guilty to maiming on four occasions, and was found guilty of maiming despite pleading not guilty nine other times.³ The accused was acquitted or found guilty of a lesser offense on the remaining nineteen specifications.⁴

The infrequency of maiming charges and convictions is somewhat unexpected, given the increased number of child abuse and domestic violence cases now being tried by courts-martial. Its rareness can be explained, in part, by the serious and limited types of injuries needed to constitute this offense. The rareness also must be attributed, however, to the fact that military practitioners are generally less familiar with maiming than other similar, less serious crimes of violence, such as aggravated assault. This general unfamiliarity with maiming probably results in the crime not being charged in many appropriate cases, and not considered as a lesser-included offense on some occasions when it reasonably is raised by the evidence.

This article seeks to reacquaint military practitioners with the scope of maiming under current military law.

Special attention is given to unsettled questions and unresolved issues. Before these matters can be addressed properly, however, the origins and development of maiming under both civilian and military law must be examined.

The Origins and Development of Maiming Under Civilian Law

"Maiming" is the modern equivalent of the traditional offense known as "mayhem."⁵ At early English common law, mayhem occurred when a person maliciously⁶ deprived another of any part of the body that was useful for offensive or defensive fighting,⁷ or diminished the victim's ability to annoy his adversary.⁸ The rationale for the offense, as pointed out by Blackstone, was that the type of injuries that the mayhem statute was meant to prevent tended to deprive the King of the military aid and assistance of his subjects.⁹ Mayhem thus was proscribed for the protection of the Crown, and derivatively, society in general. The crime, therefore, did not exist primarily for the protection of the victim individually.¹⁰

Consistent with this military rationale for mayhem, only a disabling injury could serve as the basis for the offense. For example, mayhem could be committed when the offender cut off or permanently crippled¹¹ a victim's

¹See Uniform Code of Military Justice art. 124, 10 U.S.C. § 924 (1988) [hereinafter UCMJ].

²These statistics were provided by the Clerk of the Court, the United States Army Court of Military Review. The author would like to thank Mr. William S. Fulton, Jr., for his assistance in providing these statistics.

³*Id.*

⁴*Id.*

⁵R. Perkins & R. Boyce, *Criminal Law* 238 (3d ed. 1982) (citing *State v. Thomas*, 157 Kan. 526, 142 P.2d 692 (1943); and *State v. Kuchmak*, 159 Ohio St. 363, 368, 112 N.E.2d 371, 374 (1953)). As the court in *State v. Johnson*, 58 Ohio St. 417, 51 N.E. 40 (1898), observed: "There is no question, we think, but that 'maim' as a noun, and 'mayhem' are equivalent words, or that 'maim' is but a newer form of the 'mayhem'" Some jurisdictions, on the other hand, have retained the term "mayhem" to denominate the offense and use the word "maim" to describe the type of injury required for the crime. *E.g.*, *Carpenter v. People*, 31 Colo. 284, 289, 72 P. 1072, 1074 (1903) ("a specific intent to maim was not a necessary element of the crime of mayhem"); see also *Terrell v. State*, 86 Tenn. 523, 525, 8 S.W. 212 (1888) (both cited in R. Perkins & R. Boyce, *supra* at 239 n.3).

The offense later known as mayhem has deep roots, and can be traced to biblical times. "But if injury ensues, he shall give life for life, eye for eye, tooth for tooth, hand for hand, foot for foot, burn for burn, wound for wound, stripe for stripe." Exodus 21:23-24; see also Deuteronomy 19:21.

⁶Under the early English common law, mayhem required that the injury be inflicted maliciously. R. Perkins & R. Boyce, *supra* note 5, at 239-240 (citing 1 East P.C. 393 (1803) (mayhem under English common law requires that "the act be done maliciously")).

⁷2 Wharton's *Criminal Law* § 204 (14th ed. 1979).

⁸2 W. LaFare & A. Scott, *Substantive Criminal Law* 320 (1986).

⁹4 W. Blackstone, *Commentaries* 205 (1769). Lord Coke put it similarly: "[F]or the members of every subject are under the safeguard and protection of the law, to the end a man may serve his King and country when the occasion shall be offered." Coke, 1 Inst. 127 (nd). As one court more recently observed, "Mayhem in early common law was committable only by infliction of an injury which substantially reduced the victim's formidability in combat." *Goodman v. Superior Court of Alameda County*, 84 Cal. App. 3d 621, 148 Cal. Rptr. 799, 800 (1978).

¹⁰R. Perkins & R. Boyce, *supra* note 5, at 242.

¹¹Blackstone characterized such an injury as one that "[f]orever disabled" the victim. 3 W. Blackstone, *supra* note 9, at 121. For example, in *State v. McDonie*, 89 W.Va. 185, 109 S.E. 710 (1921), a sufficiently disabling injury for common law mayhem was found where the offender scalded the victim's foot so that his toes grew together rendering him unfit to fight.

hand or finger, poked out or blinded an eye, or knocked out a foretooth.¹² Castration also constituted mayhem.¹³ Conversely, cutting off or severely injuring a victim's nose, lip, or ear did not amount to mayhem.¹⁴ These disfiguring injuries did not constitute mayhem under the early scope of the crime because the victim's fighting ability was unimpaired.¹⁵

By a series of English statutes beginning in 1403,¹⁶ mayhem was expanded to include other injuries that did not hamper directly the victim's ability to fight. The crime was enlarged to include "cutting out or disabling the tongue, severing the ear, and slitting the nose or lip."¹⁷ The catalyst for the last of these changes was the infamous assault upon Lord Coventry in the late 1660's, when several people attacked him on the street and slit his nose in revenge for statements he had made in Parliament.¹⁸ This statute, however, did not replace the common-law crime of malicious mayhem.¹⁹ It instead added an aggravated offense of intentional maiming and included intentional disfigurement within the scope of the offense.²⁰ Accordingly, the proper definition of the crime under English law in the late seventeenth century was as follows: "Mayhem is malicious maiming or maliciously and intentionally disfiguring another."²¹

Originally, the punishment imposed upon a person convicted of mayhem was the loss of the same member or other body part as suffered by the victim.²² This "eye-for-an-eye" form of punishment was abolished, according to Blackstone, because it was inadequate in the case of multiple offenders "because upon a repetition of the offense the punishment could not be repeated."²³ Imprisonment, rather than dismemberment, became the accepted punishment for mayhem long before Blackstone's time.²⁴ The Coventry Act later provided an increased penalty for intentional maiming, including the possibility of capital punishment.²⁵

Mayhem or maiming was, at one time, a separate criminal offense in virtually every American state.²⁶ In almost every case, it was a felony that subjected the offender to a substantial punishment of confinement.²⁷ Today, only a few states retain a distinct offense of mayhem in their criminal codes.²⁸ A few others have retained mayhem by decisional law.²⁹ In addition, some states define certain types of aggravated assault in substantially the same manner as mayhem.³⁰ The Model Penal Code likewise has no separate offense of mayhem, but instead treats it as a form of aggravated assault.³¹

¹²⁴ W. Blackstone, *supra* note 9, at 205-06.

¹³² Wharton, *supra* note 7, § 207. Blackstone explained that castration constitutes mayhem because it is the type of injury that weakens a man's fighting ability. Specifically, it is an injury to the victim that "depriv[es] him of those parts the loss of which in all animals abate their courage." 4 W. Blackstone, *supra* note 9, at 205.

¹⁴² Wharton's, *supra* note 7, § 207.

¹⁵⁴ W. Blackstone, *supra* note 9, at 205-06; R. Perkins & R. Boyce, *supra* note 5, at 239.

¹⁶ Subsequent statutes were enacted in 1545 and 1670. 2 W. LaFave & A. Scott, *supra* note 8, at 320.

¹⁷ *Id.*

¹⁸ R. Perkins & R. Boyce, *supra* note 5, at 239. The statutory response to this attack became known as "Coventry Act." 22 and 23 Car. 2, c. 1 (1670), cited in R. Perkins & R. Boyce, *supra* note 5, at 240 n.11.

¹⁹ See *supra* note 6.

²⁰ R. Perkins & R. Boyce, *supra* note 5, at 240.

²¹ *Id.* (emphasis omitted).

²² W. LaFave & A. Scott, *supra* note 8, at 320. In the case of castration, the punishment was death. 1 Hawk.P.C. c.44, § 3 (6th ed. 1788), cited in R. Perkins & R. Boyce, *supra* note 5, at 243. Some American statutes formerly provided for capital punishment for mayhem by castration. See Ga. Code Ann. c. 26-12 (1953), cited in R. Perkins & R. Boyce, *supra* note 5, at 243 n. 41.

²³⁴ W. Blackstone, *supra* note 9, at 206.

²⁴² W. LaFave & A. Scott, *supra* note 8, at 320.

²⁵ R. Perkins & R. Boyce, *supra* note 5, at 239; see 2 W. LaFave & A. Scott, *supra* note 8, at 320.

²⁶² W. LaFave & A. Scott, *supra* note 8, at 320.

²⁷ *Id.*; R. Perkins & R. Boyce, *supra* note 5, at 243 (mayhem "is punished as one of the grave felonies under most of the modern statutes").

²⁸² W. LaFave & A. Scott, *supra* note 8, § 207 (citing Utah Code Ann. § 76-5-105 (1953), and Wis. Stat. Ann. § 940.21 (1975)).

²⁹ Kuchmak, 159 Ohio St. 363, 112 N.E.2d 371 (1953); see *State v. Briley*, 8 Porter 472 (Ala. 1839).

³⁰² W. LaFave & A. Scott, *supra* note 8, at 320 (citing Ala. Code § 13A-6-20 (1975); Ark. Stats. § 41-1601 (1975); Conn. Gen. Stat. Ann. § 53a-59 (1971); Del. Code Ann. tit. 11, § 613 (1975); Fla. Stat. Ann. § 784.045 (West 1974); Ga. Code Ann. § 26-1305 (1975); Kan. Stat. Ann. § 21-3414 (1974); La. Rev. Stat. Ann. 14:34.1 (1975); N.Y. Penal Law § 120.10 (McKinney 1975)).

³¹ Under the Model Penal Code, one form of aggravated assault occurs when an offender "attempts to cause serious bodily injury to another, or causes such injury purposely, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life." "[S]erious bodily injury" is defined to mean "bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ." Model Penal Code §§ 210.0(3), 211.1(2)(a) (Proposed Official Draft 1962).

All modern American statutes and decisional law that still proscribe mayhem are alike in abolishing the military significance of the crime.³² Consequently, serious disfigurement, as well as dismemberment or a similarly disabling injury, is sufficient for mayhem.³³ Actually, the entire body part need not be removed, provided the injury is permanently crippling³⁴ or substantially affects the comeliness of the victim.³⁵ As two prominent commentators have stated, "the modern rationale of the crime may be said to be the preservation of the natural completeness and normal appearance of the human face and body, and not, as originally, the preservation of the sovereign's right to the effective military assistance of his subjects."³⁶

Among the injuries sufficient to constitute mayhem under modern law are the removal or permanent disablement of an arm, hand, leg, foot, finger, or toe.³⁷ Likewise, severing or slitting the nose,³⁸ lip,³⁹ ear, or tongue⁴⁰ are sufficient for mayhem. Removing an eye or seriously impairing eyesight also will suffice,⁴¹ as will causing the loss of a front tooth, but not a jaw tooth.⁴² Castration also is sufficient to sustain a conviction for

mayhem.⁴³ Other serious injuries, however, are insufficient for mayhem. These less serious injuries include cutting a throat with a knife,⁴⁴ breaking a jaw,⁴⁵ or fracturing a skull with a bludgeon.⁴⁶

Mayhem under the traditional common law required that the injury be permanent in nature.⁴⁷ Therefore, temporarily disabling a member⁴⁸ or cutting a lip that will heal without a permanent scar⁴⁹ will not suffice. Yet, one court noted that there "have long been indications that the infliction of an injury forbidden by a mayhem-type statute may constitute an offense notwithstanding the possibility that alleviation of the injury is medically possible."⁵⁰ An offender, therefore, is guilty of mayhem if he bites off a portion of the victim's lip, even if advanced medical procedures could restore the lip to the same condition as it was before the attack.⁵¹

The mental state required for mayhem varies among jurisdictions. Some versions of the crime use the phrase "unlawfully and maliciously" to describe the requisite *mens rea*.⁵² Consistent with this mental requirement, an offender would be guilty of mayhem if he or she intentionally injured the victim without an intent to maim, but

³² W. LaFave & A. Scott, *supra* note 8, at 320.

³³ See, e.g., Utah Code Ann. § 76-5-105 (1953); Wis. Stat. Ann. § 940.21 (1975).

³⁴ *Hemphill v. Commonwealth*, 265 Ky. 194, 96 S.W.2d 586 (1936) (sufficient injury for mayhem when part of a finger is permanently lost, thereby permanently crippling the finger).

³⁵ *State v. Jones*, 70 Iowa 505, 30 N.W. 750 (1886) (loss of a portion of a nose may be sufficient for mayhem).

³⁶ W. LaFave & A. Scott, *supra* note 8, at 321 (footnote omitted); see *R. Perkins v. United States*, 446 A.2d 19 (D.C. App. 1982) (approved an instruction that provided, "To be permanently disfigured means that the person is appreciably less attractive or that a part of his body is to some appreciable degree less useful or functional than it was before the injury.").

³⁷ W. LaFave & A. Scott, *supra* note 8, at 321.

³⁸ *Jones*, 70 Iowa 505, 30 N.W. 750 (1886).

³⁹ *State v. Raulie*, 40 N.M. 318, 59 P.2d 359 (1936).

⁴⁰ Cal. Pen. Code Ann. § 203 (West 1970); Idaho Code § 18-5001 (1972); R.I. Gen. Laws § 11-29-1 (1969); Utah Code Ann. § 76-5-105 (1953); Wis. Stat. § 940.21 (1958).

⁴¹ See Wharton's Criminal Law, *supra* note 7, § 207 n.87.

⁴² *Keith v. State*, 89 Tex. Crim. 264, 232 S.W. 321 (1921).

⁴³ *State v. Sheldon*, 54 Mont. 185, 169 P. 37 (1917); see *Cole v. State*, 62 Tex. Crim. 270, 138 S.W. 109 (1911) (cutting off a penis is sufficient). Some mayhem statutes also protect the private parts of women. 2 Wharton, *supra* note 7, § 207 n.91.

⁴⁴ *Rex v. Lee*, 1 Leach 51, 168 Eng. Rep. 128 (1763).

⁴⁵ *Commonwealth v. Lester*, 2 Va. Cas. 198 (1820).

⁴⁶ *Foster v. People*, 50 N.Y. 598 (1872).

⁴⁷ See 3 W. Blackstone, *supra* note 9, at 121 ("[Mayhem] is a battery attended with this aggravating circumstance, that thereby the party is forever disabled."); *Kuchmak*, 159 Ohio St. 363, 112 N.E.2d 371 (1953); *Lee v. Commonwealth*, 135 Va. 572, 115 S.E. 671 (1923); *State v. Enkhous*, 40 Nev. 1, 160 P. 23 (1916); *Briley*, 8 Porter 472 (Ala. 1839).

⁴⁸ See *Briley*, 8 Porter 472, 474 (Ala. 1839); see also *Baker v. State*, 4 Ark. 56 (1842) (shooting injury to the victim's thigh, which rendered him unable to walk at the time of trial, is presumed to be permanent, absent evidence to the contrary).

⁴⁹ *State v. Raulie*, 40 N.M. 318, 59 P.2d 359 (1936).

⁵⁰ *United States v. Perkins*, 446 A.2d 19 (D.C. App. 1982) (quoting *United States v. Cook*, 462 F.2d 301 (D.C. Cir. 1972)).

⁵¹ *Lamb v. Cree*, 86 Nev. 179, 466 P.2d 660 (1970); *Slattry v. State*, 41 Tex. 619, 621 (1874) (dicta); see also *People v. Nunes*, 47 Cal. App. 346, 190 P. 486 (1920) (eye injury is sufficient for mayhem even though slight possibility exists that a future operation will improve the victim's eyesight).

⁵² E.g., Idaho Code § 18-5001 (1972); Cal. Pen. Code Ann. § 203 (West 1970).

nonetheless inflicted a maiming-type injury.⁵³ Other jurisdictions require that the injury be inflicted with a specific intent to maim or disfigure;⁵⁴ however, the precise injury inflicted need not be intended specifically.⁵⁵ Some states require a state of mind similar to that needed for common-law murder. These states require either that an intent to maim existed, or that an unlawful act was done under circumstances in which a maiming-type injury is likely and foreseeable, even if not intended.⁵⁶ Absent special statutory language, however, conduct that is merely unlawful or reckless is insufficient for mayhem.⁵⁷

Because mayhem is essentially an offense against the state, rather than the individual, consent by the victim will not operate as a defense. This is especially true in cases in which the harm to society is great and no good justification for inflicting the injury exists.⁵⁸ In an old English case, for example, the defendant was guilty of mayhem when he cut off the hand of a companion—at the latter's request—to make his friend a more effective beggar.⁵⁹ On the other hand, a physician obviously is not guilty of mayhem when, with the patient's consent, he or she amputates a limb or member to save the patient's life.⁶⁰

A "reasonable" provocation on the part of the victim that causes an offender to have a rage to maim him or her does not constitute a defense to mayhem in civilian jurisdictions.⁶¹ Other traditional defenses, however, such as

self-defense, are available to a defendant charged with mayhem in an appropriate case.⁶²

The Origins and Development of Maiming Under Military Law

The common-law offense of mayhem became a specific military crime in 1863.⁶³ Court-martial jurisdiction over mayhem, however, was limited to times of war, insurrection, or rebellion.⁶⁴ As one noted military commentator explained, "In the Articles of War of 1874 mayhem was included, but the [jurisdictional] limitations were retained. In 1916, these limitations were removed so that mayhem was triable by courts-martial regardless of where or when committed. In naval law, it was charged under the general article."⁶⁵

Mayhem under early military law was substantially the same offense as common-law mayhem under traditional English law. This is illustrated by a court-martial case tried in 1881.⁶⁶ In that case, an Army private was convicted of mayhem under the sixty-second Article of War, in that he "did, without just cause or provocation, maliciously and wilfully bite a large piece off of the left ear of [the victim during an] angry scuffle."⁶⁷ Although the accused's conviction for a general disorder was affirmed later, the language pertaining to mayhem was excepted because the "disfigurement could not impair the ability of the injured party to defend himself, nor abate his courage."⁶⁸

⁵³For example, in *Terrell v. State*, 86 Tenn. 523, 8 S.W. 212 (1888), the defendant threw a piece of brick at the victim, intending to injure him but not to maim. The conviction for mayhem was affirmed, because the brick had stricken the victim in the eye, putting it out. *Accord* *Carpenter v. People*, 31 Colo. 284, 72 P. 1072 (1903) (severing an ear, either intending to do so or merely while intending to injure generally, was sufficient for mayhem); *Keith v. State*, 89 Tex. Crim. 264, 232 S.W. 321 (1921) (knocking out victim's front tooth, intending to injure but not to maim was sufficient for mayhem); see *Perkins*, 446 A.2d at 19 (distinguishing between mayhem, which requires no specific intent to maim, and malicious disfigurement, which does).

⁵⁴*Banovitch v. Commonwealth*, 196 Va. 210, 83 S.E.2d 369 (1954); *Hiller v. State*, 116 Neb. 582, 218 N.W. 386 (1928); *State v. Bloedow*, 45 Wis. 279 (1878); *State v. Evans*, 2 N.C. 281 (1796).

⁵⁵*De Arman v. State*, 33 Okla. Crim. 79, 242 P. 783 (1926). See generally 2 W. LaFave & A. Scott, *supra* note 8, at 323-24 n.27 (discussion of whether mental state is sufficient for mayhem when the offender intends to murder the victim but only maims him).

⁵⁶E.g., *People v. Crooms*, 66 Cal. App. 491, 152 P.2d 533 (1942); *Terrell*, 86 Tenn. 523, 8 S.W. 212 (1888); *Davis v. State*, 22 Tex. App. 45, 2 S.W. 630 (1886).

⁵⁷See generally 2 W. LaFave & A. Scott, *supra* note 8, at 324 n.28 (discussing state decisions in which the mental state for mayhem is satisfied when the offender's conduct is merely reckless or unlawful).

⁵⁸R. Perkins & R. Boyce, *supra* note 5, at 242. These commentators analogize a victim's consenting to being maimed to a victim's consenting to be murdered, which likewise is not a recognized defense to that offense. *Id.* at 242 n.39 (citing *People v. Roberts*, 211 Mich. 187, 178 N.W. 690 (1920)).

⁵⁹*Wright's Case*, Co. Lit. 127a (1604); see *State v. Bass*, 255 N.C. 42, 120 S.E.2d 580 (1961) (defendant held liable as an accessory before the fact to mayhem, when he administered an anesthetic to the victim's hand with the victim's consent so that the latter could cut off his fingers to obtain insurance proceeds).

⁶⁰2 W. LaFave & A. Scott, *supra* note 8, at 324 n.31; R. Perkins & R. Boyce, *supra* note 5, at 242.

⁶¹2 W. LaFave & A. Scott, *supra* note 8, at 324 (citing *Sensobaugh v. State*, 92 Tex. Crim. 417, 244 S.W. 379 (1922) (no defense to mayhem when a husband, catching his wife in the act of adultery with her lover, cut off the lover's sex organ with a razor); and 4 W. Blackstone, *supra* note 9, at 206 (no such crime as "voluntary mayhem" exists that can be compared to voluntary manslaughter, in which an offender's culpability is reduced because of the reasonable provocation of the victim)).

⁶²2 W. LaFave & A. Scott, *supra* note 8, at 324 n.29 (citing *People v. Wright*, 93 Cal. 564, 29 P. 240 (1892)).

⁶³12 Stat. 736 (1863), cited in J. Snedeker, *Military Justice Under the Uniform Code* § 3405b (1953).

⁶⁴Article of War 58 (1876), cited in *Manual for Courts-Martial, United States*, 1905, at 109; see Snedeker, *supra* note 63, § 3405b.

⁶⁵Snedeker, *supra* note 63, § 3405b (footnotes omitted). Under the 1916 Articles of War, mayhem was charged under the 93d article in the Army. *Id.*; see *Naval Courts and Boards, United States*, 1937, § 122 (mayhem charged under the general article in the Navy).

⁶⁶G.C.M.O. 103, Dept. of the Mo. (1881).

⁶⁷*Id.*

⁶⁸*Id.*; see 2 W. Winthrop, *Military Law and Precedents* 1048 n.2 (1st ed. 1896) (citing other early cases having a similar result).

As the 1921 Manual for Courts-Martial reflects, a second crime called "maiming"—separate from the enumerated offense of mayhem—later was recognized by military law under the ninety-sixth Article of War, the so-called general article.⁶⁹ Maiming under the general article included injuries that disfigured, as well as injuries that disabled the victim in a military sense.⁷⁰ Also included under maiming was "scalding with hot water, vitriol or other corrosive acid, or a caustic substance"⁷¹ These separate offenses of mayhem and maiming continued through subsequent editions of the Manual prior to 1950.⁷²

Mayhem and maiming were combined under a single article of the 1950 Uniform Code of Military Justice (UCMJ).⁷³ Article 124 of the 1950 UCMJ referred to this combined offense as "maiming."⁷⁴ Although the new offense of maiming was based on the ninety-third article of the 1948 Articles of War, it was wider in scope than common-law mayhem.⁷⁵ Actions amounting to maiming included the infliction of injuries that seriously disfigured the victim, that destroyed or disabled a member or organ of the victim's body, and that seriously diminished the physical vigor of the victim by injuring a member or organ.⁷⁶ To constitute maiming, the injury had to be "of a substantially permanent nature"; the crime, however, still could occur "even though there is a possibility that the victim may eventually recover," through surgery or otherwise.⁷⁷

According to the 1951 Manual, maiming required the accused to have a specific intent to injure, disfigure, or

disable at the time the injury was inflicted.⁷⁸ The legislative history of article 124 likewise indicates that maiming is a specific intent offense, but that this intent can be implied based upon the nature of the injury inflicted. Specifically, commentators on its legislative history have stated,

It should be noted that Article 124 does not appear to require an intent to *seriously* injure, or a specific intent to maim, as do some State statutes. It requires only that the injury inflicted, for example, be serious. Hence, it could be no defense to a charge of maiming that the accused intended only a slight injury, if in fact, he did inflict serious harm.⁷⁹

Only a few reported military cases directly address maiming under the UCMJ. The first case to make even a passing reference to maiming was *United States v. Lowry*, decided in 1954.⁸⁰ The Court of Military Appeals in *Lowry* examined the sufficiency of the evidence to support the accused's conviction for maiming. In his confession, the accused admitted that he entered a woman's barracks building and beat a sleeping female soldier in the head with the nozzle of a fire hose.⁸¹ In finding the evidence sufficient to affirm the accused's conviction, the court concentrated on the credibility of the accused's later denial that he inflicted the injuries and the testimony of several alibi witnesses. The court, unfortunately, did not discuss the nature or permanence of the injuries sustained by the victim,⁸² or the accused's *mens rea* at the time of the offense.⁸³

⁶⁹The 93d article of the 1917 Articles of War proscribed mayhem among other offenses. See Manual for Courts-Martial, United States, 1921, para. 443, at 415-16 [hereinafter MCM, 1921]; see also L. Alyea, *Military Justice Under the 1948 Amended Articles of War* 57 (1949). The 96th article—the general article—proscribed maiming. See MCM, 1921, para. 446, at 464-65; see also L. Alyea, *supra*, at 59-60.

⁷⁰MCM, 1921, para. 446, at 465.

⁷¹*Id.* Self-maiming, a forerunner of malingering under modern military law, also was prohibited. W. Winthrop, *Military Law and Precedents* 676 (1920 Reprint).

⁷²See Manual for Courts-Martial, United States, 1928, para. 149b (mayhem), and app. 4, para. 163 (maiming); Manual for Courts-Martial, United States, 1949, para. 180b (mayhem), and app. 4, para. 161 (maiming).

⁷³50 U.S.C. §§ 551-736 (1950) [hereinafter UCMJ, 1950].

⁷⁴See Manual for Courts-Martial, United States, 1951, para. 203 [hereinafter MCM, 1951].

⁷⁵*Snedeker, supra* note 63, § 3405b. The commentary in the legislative history pertaining to maiming indicates that article 124 was intended to be "broader in scope than common law mayhem. It includes injuries which would not have the effect of making a person less able to fight." *Index and Legislative History of the Uniform Code of Military Justice* 1233 (1950). It also includes "everything that would have been mayhem at common law." *Id.*

⁷⁶MCM, 1951, para. 203; see *Snedeker, supra* note 63, § 3405c.

⁷⁷MCM, 1951, para. 203.

⁷⁸*Id.*; see *Snedeker, supra* note 63, § 3405f.

⁷⁹Legal and Legislative Basis, Manual for Courts-Martial 280 (1951) (emphasis in original).

⁸⁰16 C.M.R. 22 (C.M.A. 1954).

⁸¹*Id.* at 24.

⁸²The court noted that "traces of blood" were found on the fire hose and on the floor of the barracks. *Id.* at 25.

⁸³*Id.* at 24-25.

The first reported military case to address maiming in any detail was *United States v. Davis*.⁸⁴ The evidence showed that the accused in *Davis* struck a hard blow to a patrolman's head, knocking him to the ground.⁸⁵ The accused then kicked the patrolman in the face as he lay prostrate. The injuries suffered by the victim included broken bones in his cheek, a swollen face, and a puckered lip.⁸⁶ The victim also suffered nerve damage to his face, from which he possibly could have recovered within six months to a year.⁸⁷ Additionally, the victim's eye was damaged, requiring him to wear glasses permanently.⁸⁸

The board in *Davis* noted initially that article 124 encompasses some injuries that do not make the victim less able to fight or defend himself.⁸⁹ Therefore, consistent with the language of article 124 and the description of the offense in the 1951 Manual,⁹⁰ the board explicitly recognized that maiming was broader in scope than common-law mayhem.⁹¹

The victim's testimony in *Davis* regarding the severity of his eye injury, however, was determined to be incompetent hearsay by the board and therefore was not considered.⁹² Consequently, the remaining evidence of injury was limited to the victim having suffered a black eye, a simple fracture of the cheek bone that was corrected by surgery, and other minor injuries. The board concluded that this evidence "hardly bespeaks the severity" of injury required for maiming, and thus the accused's conviction for this offense was reversed.⁹³ The board further

concluded, however, that the evidence was sufficient to support the accused's conviction for the lesser-included offense of aggravated assault by intentionally inflicting grievous bodily harm.⁹⁴

The board in *Davis* also considered the *mens rea* requirement for maiming. The board acknowledged that maiming under article 124 is a specific intent crime, but noted that the requisite specific intent broadly includes an intent to injure, disfigure, or disable. A specific intent to maim, therefore, is not required. The board concluded that the type of injuries inflicted upon the victim in *Davis* were "presumptive evidence of an intent to injure, disfigure or disable."⁹⁵

The next important case to consider maiming under military law—*United States v. Hicks*⁹⁶—also focused upon the required *mens rea* for the offense. In *Hicks* the accused struck a hard blow to the victim's eye that was so serious the eye had to be removed.⁹⁷ The law officer instructed, in part, that the "offense of maiming only requires a general criminal intent to injure and does not require a specific intent to maim. Therefore, it could be no defense to a charge of maiming that the accused intended only a slight injury, if in fact, he did inflict serious harm."⁹⁸ The court found that the instruction was adequate, concluding that article 124, "[r]ead naturally ... requires an intent merely to injure."⁹⁹ The court held further that the "legislative background of the Uniform Code also impels the conclusion that Article 124 requires

⁸⁴ 17 C.M.R. 473 (N.B.R. 1954).

⁸⁵ *Id.* at 475.

⁸⁶ *Id.* at 477-78.

⁸⁷ *Id.* at 478.

⁸⁸ *Id.* at 477-78.

⁸⁹ *Id.* at 476-79.

⁹⁰ UCMJ, 1950, art. 124 provided:

Any person subject to this code who, with intent to injure, disfigure, or disable, inflicts upon the person of another an injury which—

- (1) seriously disfigures his person by any mutilation thereof; or
- (2) destroys or disable any member or organ of his body; or
- (3) seriously diminishes his physical vigor by the injury of any member or organ;

is guilty of maiming and shall be punished as a court-martial may direct.

⁹¹ See MCM, 1951, para. 203.

⁹² *Davis*, 17 C.M.R. at 479.

⁹³ *Id.*

⁹⁴ See UCMJ, 1950, art. 128(b)(2). Grievous bodily harm was defined as follows:

[Grievous bodily harm] does not include minor injuries such as a black eye or a bloody nose, but does include fractures or dislocated bones, deep cuts, torn members of the body, serious damage to internal organs and other serious bodily injuries. When grievous bodily harm has been inflicted by means of intentionally using force in a manner likely to achieve that result, it may be inferred that grievous bodily harm was intended.

MCM, 1951, para. 207.

⁹⁵ *Davis*, 17 C.M.R. at 479.

⁹⁶ 20 C.M.R. 337 (C.M.A. 1956).

⁹⁷ *Id.* at 338. The medical testimony at trial indicated that the injury could not have been caused by a bare fist, but that a small instrument had to have been used. *Id.*

⁹⁸ *Id.* at 339-40.

⁹⁹ *Id.* at 339.

no more than an intent to injure, not an intent to inflict serious injury."¹⁰⁰ Accordingly, the accused's conviction for maiming was affirmed.

The next significant case to allude to maiming was *United States v. Thompson*,¹⁰¹ which addressed the relationship between maiming and aggravated assault, and the infliction of grievous bodily harm. In *Thompson* the accused and some companions struck and kicked the victim so severely that his eyelid was slit, requiring two stitches, and his two front teeth had to be removed.¹⁰² For this misconduct, the accused was convicted of aggravated assault with the intentional infliction of grievous bodily harm. The board acknowledged that the loss of the victim's front teeth could constitute a sufficient injury for maiming under article 124.¹⁰³ A majority of the board, however, concluded that "[u]nder the circumstances shown here we are not convinced as a matter of fact that the injuries shown to have been inflicted ... should be characterized as grievous."¹⁰⁴ Accordingly, the board affirmed the accused's conviction for the lesser-included offense of assault by battery.¹⁰⁵

In *United States v. Johnson*¹⁰⁶ the accused was convicted of malingering¹⁰⁷ and conspiring to commit maiming upon himself.¹⁰⁸ The evidence showed that the accused and some companions were discussing the effect of Freon on frogs—and thereafter its effect on parts of the human body—when the conversation shifted to cutting off a thumb or finger to avoid military duties.¹⁰⁹ The accused later laid his hand on a board, urging his friends to cut off his thumb. At one point, the accused wrapped a rag smeared with red paint around his thumb, pretending that he had just amputated it. On a later date, the accused finally convinced another marine to cut off his thumb, which was accomplished with a freshly sharpened axe.

The primary issue addressed by the board in *Johnson* was whether the accused could be guilty of conspiring to maim himself. The board first concluded that the accused could not be guilty of maiming himself as a perpetrator; rather, article 124 requires that the injury inflicted by the accused be upon another person.¹¹⁰ The board then noted, however, that an accused could be found guilty of conspiring to commit a crime that he or she "is unable to commit ... [or] is one which only one of them could commit, as where the agreement is to cause the offense to be committed by others"¹¹¹ For example, the board observed that although a husband, acting alone, could not be found guilty of raping his wife under military law as a perpetrator, he could, nonetheless, be guilty of conspiring to rape his wife under appropriate circumstances. The board applied the same logic for the offense of maiming and affirmed the accused's conspiracy conviction.

In *United States v. Goins*¹¹² and its companion case, *United States v. White*,¹¹³ the Court of Military Appeals addressed whether maiming was a lesser-included offense of robbery,¹¹⁴ even when the same violence was the basis of both charges. The evidence showed that Goins struck the victim several times in the head with a wrench, and then White placed his knee on the victim's neck and "proceeded to smash his skull with [the wrench] until all movement ceased."¹¹⁵ A short time later, Goins and White took the money from the victim's wallet and abandoned him by the side of the road. A search of the surrounding area uncovered several pieces of the victim's skull, and a large mass of the victim's brain was found protruding from his head. After several operations, the victim's prognosis was that he suffered irreversible brain damage and would remain indefinitely in a vegetative state.¹¹⁶

¹⁰⁰*Id.* at 340.

¹⁰¹27 C.M.R. 662 (A.B.R. 1959).

¹⁰²*Id.* at 665.

¹⁰³*Id.* at 667.

¹⁰⁴*Id.* (citing *United States v. Miles*, 10 C.M.R. 283 (A.B.R. 1953)).

¹⁰⁵*Thompson*, 27 C.M.R. at 669. The dissenter disagreed, and would have affirmed the accused's conviction for aggravated assault. See *id.* (Searles, J., concurring and dissenting).

¹⁰⁶28 C.M.R. 629 (N.B.R. 1959).

¹⁰⁷See UCMJ, 1950, art. 115.

¹⁰⁸See *id.* art. 81.

¹⁰⁹*Johnson*, 28 C.M.R. at 630.

¹¹⁰*Id.* at 630-31.

¹¹¹*Id.* at 631.

¹¹²40 C.M.R. 107 (C.M.A. 1969).

¹¹³40 C.M.R. 111 (C.M.A. 1969).

¹¹⁴See UCMJ, 1950, art. 122.

¹¹⁵*Goins*, 40 C.M.R. at 108.

¹¹⁶*Id.* at 108-09.

Goins and White contended that maiming was a lesser-included offense of robbery and that, therefore, the maiming charge was multiplicitous with the robbery charge for all purposes. In response, the court first acknowledged its prior decisions, which held that robbery and aggravated assault are multiplicitous when the same force and violence is used for both.¹¹⁷ The court distinguished these decisions from the present case, however, and determined that maiming and robbery were separate based upon several tests for multiplicity—namely, the jurisdictional norms test,¹¹⁸ the elements test,¹¹⁹ and the facts test.¹²⁰ The court concluded that “[w]hen a person bent on robbery uses force and violence so greatly in excess of that required to steal that his victim is permanently disabled or disfigured, the robber can be held to have committed maiming.”¹²¹

In *United States v. Tua*¹²² the accused attempted to raise the defense of voluntary intoxication to a maiming charge.¹²³ The military judge instructed that maiming was a general intent crime; therefore, voluntary intoxication could not be a defense.¹²⁴ The court of review found that the instruction was not erroneous, relying primarily on a phrase contained in the 1969 Manual’s discussion of maiming that referred to it as requiring only a “general criminal intent.”¹²⁵ The court also commented, without elaboration, that it was relying on *Hicks*.¹²⁶

The last military case to address the substantive aspects of maiming¹²⁷ was *United States v. McGhee*.¹²⁸ The

accused in *McGhee* and her friend, an Army sergeant, repeatedly beat the accused’s six-year-old son with a wire coat-hanger, an electrical extension cord, and a leather belt.¹²⁹ These beatings left scars over the child’s face and body—primarily upon his buttocks. The court found, however, that the scars were not “easily detectable to the casual observer,” based upon its viewing of photographs in the record and a doctor’s trial testimony.¹³⁰

The court in *McGhee* concluded that the injuries suffered by the victim were not sufficient to constitute maiming. The issue, as framed by the court, was whether the injuries “impair[ed] perceptibly and materially the victim’s comeliness.”¹³¹ The court, relying on the discussion of comeliness found in the Legal and Legislative Basis Manual for Courts-Martial, 1951,¹³² and Webster’s Dictionary,¹³³ found that they did not. According to the court, these faint scars—especially the scars on the victim’s buttocks—did not detract materially from the pleasing appearance of the external form of the victim. Nevertheless, the court affirmed the lesser-included offense of aggravated assault with a means likely to inflict grievous bodily harm.¹³⁴

The Present Scope of Maiming Under Military Law

The current maiming statute substantively is unchanged from its original form in the 1950 UCMJ,¹³⁵ and provides:

¹¹⁷ *Id.* at 109 (citing *United States v. Walker*, 25 C.M.R. 144 (C.M.A. 1958), and *United States v. McVey*, 15 C.M.R. 167 (C.M.A. 1954)).

¹¹⁸ Each offense has a distinct and separate gravamen. The gravamen of maiming is to protect the victim’s military competence; the gravamen of robbery is to protect the peaceful right of property ownership. *Id.* at 110.

¹¹⁹ Each offense has a distinct element of proof not included in the others. Maiming and not robbery requires an intent to injure, disfigure, or disable the victim, as well as a serious injury; robbery and not maiming requires the unlawful taking of the victim’s property. *Id.*

¹²⁰ Each offense is established, in part, by facts not required to prove the other. The robbery was supported by the initial blows and the taking of the property; the later beating manifested a separate intent going beyond the force necessary to commit the robbery. *Id.*

¹²¹ *Id.* at 110-11.

¹²² 4 M.J. 761 (A.C.M.R. 1977).

¹²³ *Id.* at 763.

¹²⁴ See generally Milhizer, *Voluntary Intoxication as a Criminal Defense Under Military Law*, 127 Mil. L. Rev. 131 (1990).

¹²⁵ Manual for Courts-Martial, United States, 1969 (rev. ed.), para. 203 [hereinafter MCM, 1969], provides, in part, that maiming “requires only a general criminal intent to injure and not a specific intent to maim.” Elsewhere in that paragraph, however, the Manual indicates that maiming requires “an intent to injure, disfigure, or disable”; that the means of inflicting the injury “may be considered on the question of intent”; and that “one commits the offense who intends only a slight injury” *Id.*

¹²⁶ See *supra* notes 96-100 and accompanying text.

¹²⁷ In the interim, opinions occasionally would make a passing reference to a maiming conviction and the facts that supported it. *E.g.*, *United States v. Dowell*, 10 M.J. 36, 37 (C.M.A. 1980) (maiming by disfiguring the victim’s face and neck with a bottle).

¹²⁸ 29 M.J. 840 (A.C.M.R. 1989).

¹²⁹ *Id.* at 841.

¹³⁰ *Id.*

¹³¹ *Id.* (citing Manual for Courts-Martial, United States, 1984, Part IV, para. 50c(1) [hereinafter MCM, 1984]).

¹³² “Article 124 looks only to maintaining the integrity of the person, the natural completeness and comeliness of the human members and organs, and the preservation of their functions.” Legal and Legislative Basis, Manual for Courts-Martial 280, 490 (1950) (Mayhem and Related Offenses § 3).

¹³³ “Disfigure means to ‘make less complete, perfect, or beautiful in appearance.’ Webster’s Third International Dictionary 649 (1981). ‘Mutilate’ means to ‘cut up or alter radically so as to make imperfect.’ *Id.* at 1492. ‘Comeliness’ means ‘the condition of being comely [(having a pleasing appearance) especially] with respect to grace or beauty of external form.’ *Id.* at 454.

¹³⁴ *McGhee*, 29 M.J. at 841.

¹³⁵ See *supra* note 90.

Any person subject to this chapter who, with intent to injure, disfigure, or disable, inflicts upon the person of another an injury which—

(1) seriously disfigures his person by any mutilation thereof;

(2) destroys or disables any member or organ of his body; or

(3) seriously diminishes his physical vigor by the injury of any member or organ;

is guilty of maiming and shall be punished as a court-martial may direct.¹³⁶

The elements of proof for maiming, as set forth in the 1984 Manual, are as follows:

(1) That the accused inflicted a certain injury upon a certain person;

(2) That this injury seriously disfigured the person's body, destroyed or disabled an organ or member, or seriously diminished the person's physical vigor by the injury to an organ or member; and

(3) That the accused inflicted this injury with an intent to cause some injury to a person.¹³⁷

Several important aspects of the offense have been resolved with varying degrees of certainty. Apparently well settled is the type of injury required to constitute maiming. The present maiming statute clearly encompasses all injuries sufficient for common-law mayhem by the phrase, "destroys or disables any member or organ of the body." Also consistent with the common law, injuries to members or organs that seriously diminish the victim's physical vigor—the modern day equivalent to the victim's fighting ability—also can constitute maiming. Serious disfigurements, such as cutting off an ear, slitting a nose, or severely scarring with acid—which are adequate for the offense in most civilian jurisdictions—likewise are sufficient injuries for maiming under the military statute. On the other hand, scars or other injuries that do not detract materially from the victim's comeliness are insufficient for maiming, even if permanent in nature. Consistent with most civilian jurisdictions, a serious injury of a substantially permanent nature is suffi-

cient for maiming, even if the victim may some day recover because of surgery or otherwise.

Military law is equally clear that maiming-type injuries may be inflicted by a variety of instrumentalities. Traditional weapons, expedient substitutes, and bare hands all can be instrumentalities of maiming. Although the type of weapon involved is not pertinent to the issue of whether or not a maiming has occurred, it may bear upon the accused's intent. When an accused uses a weapon readily capable of maiming in a manner that makes maiming a likely and foreseeable result, this can raise a permissive inference that the accused intended to injure, if not maim.¹³⁸

The required mental state of mind for maiming under military law, however, still is unsettled. This uncertainty can be traced, surprisingly, to a single, inartful phrase in an instruction given nearly thirty-five years ago by the law officer in *Hicks*.¹³⁹ The law officer correctly instructed that maiming is a specific intent crime, which was consistent with the plain language of the military statute, its legislative history, and the civilian origins of the offense. The board of review in *Hicks* concluded that the law officer actually had instructed correctly that maiming requires a specific intent to injure, but that it does not require a specific intent to maim. During the course of his instruction, however, the law officer said that maiming requires a "general criminal intent to injure,"¹⁴⁰ rather than saying it requires a "specific criminal intent to injure generally." This imprecise language was incorporated into the 1969 Manual,¹⁴¹ and later used by the court in *Tua*¹⁴² as the basis for concluding that maiming was a general intent crime not requiring a specific intent to injure.

The 1984 Manual attempted to resolve this confusion and to indicate clearly that maiming is a specific intent crime. The Manual provides, "Maiming requires a specific intent to injure generally but not a specific intent to maim. Thus, one commits the offense who intends only a slight injury, if in fact there is infliction of an injury of the type specified in this article."¹⁴³ Actually, the analysis of this subparagraph of the Manual indicates that "[t]he discussion of intent [for maiming] has been modified to reflect that some specific intent to injure is necessary."¹⁴⁴

¹³⁶UCMJ art. 124.

¹³⁷MCM, 1984, Part IV, para. 50b.

¹³⁸See generally *United States v. Varraso*, 21 M.J. 129 (C.M.A. 1985); *United States v. Owens*, 21 M.J. 117 (C.M.A. 1985) (permissive inference is recognized that a person intends the natural and probable consequences of an intentional act).

¹³⁹See *supra* notes 96-100 and accompanying text.

¹⁴⁰*Id.* at 338 (emphasis added).

¹⁴¹See Dep't of Army, Pam. 27-2, Analysis of Contents, Manual for Courts-Martial, United States, 1969 (Rev. ed.) 28-15 (28 July 1970); see also *supra* note 125.

¹⁴²4 M.J. 761 (A.C.M.R. 1977).

¹⁴³MCM, 1984, Part IV, para. 50c(3).

¹⁴⁴*Id.* para. 50c analysis, at A21-97.

Nevertheless, the required state of mind for maiming under military law has not been resolved definitively. The Court of Military Appeals denied petition in *Tua*,¹⁴⁵ and it has not decided a case discussing maiming since 1969. Consequently, *Tua* remains the last reported military case to address the intent required for maiming. Whether maiming is a specific intent offense likely will remain unsettled until the Court of Military Appeals squarely decides the issue.¹⁴⁶

The question of the required intent for maiming has important practical significance. If maiming is a specific intent crime, state of mind defenses, such as voluntary intoxication¹⁴⁷ and partial mental responsibility,¹⁴⁸ would be available. Other defenses, such as mistake of fact, would apply differently.¹⁴⁹ Accordingly, the scope of information relevant to findings and favorable to the defense would be substantially greater if maiming is defined as a specific intent offense. In addition, the prosecution would be required to prove a more demanding specific intent element that, by its nature, rarely can be shown by direct evidence. This more difficult requirement, in turn, would result in a greater likelihood of acquittal on a maiming charge. Other defenses, based upon justification and excuse, would have the same application, regardless of whether or not maiming is characterized as being a special intent offense.¹⁵⁰

The decisional law seems clear that the victim's consent will not operate as a defense to maiming. This

refusal to allow the consent defense to a crime of such violence is consistent with the military precedent that rejects consent as a defense to assault when the injury is more than trifling or when a breach to the public order occurs.¹⁵¹ This principle has been applied recently in decisions rejecting consent as a defense to aggravated assault, based upon the accused's having "consensual" unsafe sex when he knew that he had the AIDS virus and was aware of the riskiness of his behavior.¹⁵²

The statutory language in article 124 is clear that an accused cannot be guilty of self-maiming. Military case law correctly indicates that the accused can, nonetheless, be guilty of conspiring to maim himself or herself under certain circumstances. No military court, however, has addressed whether an accused could be guilty of maiming his or her own person as a principal under an aiding and abetting theory.¹⁵³ Civilian precedent seems clear, however, that an accused could be found guilty under an accomplice theory of committing a crime that he or she is legally unable to commit as a perpetrator.¹⁵⁴ For example, a husband could be convicted of raping his wife¹⁵⁵ as an aider and abettor—for instance, by holding her down so another man could have sexual intercourse with her by force and without consent—even though he personally could not rape his wife as a perpetrator under military law.¹⁵⁶ As two noted commentators have observed:

Such results as these are in no sense inconsistent with the terms of the offenses involved. While the

¹⁴⁵ 5 M.J. 91 (C.M.A. 1978). The precedential import of denying a discretionary review is doubtful. Note, however, that UCMJ article 67(b)(3) requires that the Court of Military Appeals grant petition "on good cause shown." Because the military judge's refusal in *Tua* to instruct on voluntary intoxication, if raised, would constitute a prejudicial error, one might conclude that the denial of petition indicated either that the defense was not raised by the evidence or that the characterization of maiming as a general intent offense was not erroneous, or both. This conclusion, however, presumes that the instructional issue was not waived, which is unclear from the reported facts.

¹⁴⁶ For a discussion of the general difficulty in distinguishing between specific and general intent offenses, see Milhizer, *supra* note 124, at 149 n.106.

¹⁴⁷ MCM, 1984, Rule for Courts-Martial 916(l)(2) [hereinafter R.C.M.]; see generally Milhizer, *supra* note 124, at 158.

¹⁴⁸ See MCM, 1984, R.C.M. 916(k)(2); *Ellis v. Jacob*, 26 M.J. 90 (C.M.A. 1988).

¹⁴⁹ See MCM, 1984, R.C.M. 916(j); see generally TJAGSA Practice Note, *Recent Applications of the Mistake of Fact Defense*, The Army Lawyer, Feb. 1989, at 66.

¹⁵⁰ See MCM, 1984, Part IV, para. 50c(4); see also *supra* notes 58-62, and accompanying text (discussing defenses to maiming in civilian jurisdictions).

¹⁵¹ *United States v. Holmes*, 24 C.M.R. 762, 764-65 (A.F.B.R. 1957) (consent of the victim not a defense to assault by battery when the accused knocked the victim to the ground and "jabbed" her several times in the face with his foot, causing her mouth to be bruised and swollen); see also *United States v. O'Neal*, 36 C.M.R. 189 (C.M.A. 1966) (both parties to a mutual affray are guilty of assault).

¹⁵² *United States v. Johnson*, 27 M.J. 798, 803-04 (A.F.C.M.R. 1988) (consent not a defense to aggravated assault charge); accord *United States v. Dumford*, 28 M.J. 836 (A.F.C.M.R. 1989).

¹⁵³ See UCMJ art. 77; MCM, 1984, Part IV, para. 1. To be guilty as an aider and abettor under military law, the accused must aid, counsel, command, or encourage the commission of an offense under the UCMJ, be present at the scene of the crime, and share the criminal intent of the perpetrator. See MCM, 1984, Part IV, paras. 1b(1), 1b(2).

¹⁵⁴ See 2 W. LaFare & A. Scott, *supra* note 8, § 6.8(e), and the authorities cited therein.

¹⁵⁵ See UCMJ art. 120(a).

¹⁵⁶ *Id.*; see MCM, 1984, Part IV, para. 45b(1)(b); cf. *United States v. Minor*, 11 M.J. 609, 610-11 (A.C.M.R. 1981) (accused could be found guilty of forcible sodomy under an aider and abettor theory when evidence showed that he forced the victim's boyfriend to perform cunnilingus upon her, even though the boyfriend could not be found guilty as a perpetrator because he was not subject to the UCMJ and lacked any criminal *mens rea*).

applicable statutes state that these crimes may be committed only by certain persons or classes of persons, it must be remembered that an individual within the scope of the definition *did* commit the crime as a principal in the first degree. The evil or harm with which the legislature was concerned has thus occurred, and the purposes of the criminal law are well served by also holding accountable those persons not covered by the statute who assisted in bringing about the proscribed result.¹⁵⁷

This conclusion that the accused could be convicted as an aider and abettor for self-maiming could have important practical consequences. For example, an accused apparently could be punished separately for self-maiming as a principal and for conspiring to maim himself.¹⁵⁸ The defense, of course, could argue that the rationale for punishing conspiracy separately—that collective criminal agreement presents a greater potential threat to the public and increases the chances that the crime will succeed¹⁵⁹—does not apply when joint criminal activity is required for the accused to be found guilty of the underlying conduct.¹⁶⁰ Nevertheless, the accused under such circumstances could be convicted of malingering in conjunction with conspiracy to maim.

The 1984 Manual lists several types of assault as lesser-included offenses of maiming, including assault with the intentional infliction of grievous bodily harm.¹⁶¹ In *Thompson*,¹⁶² however, the board concluded that in

some circumstances a maiming-type injury would not amount to grievous bodily harm for purposes of aggravated assault.¹⁶³ This conclusion may seem doubtful at first, because all maiming-type injuries apparently would be serious enough to constitute grievous bodily harm. Upon closer examination, however, the result in *Thompson* might be correct in some limited circumstances.

For example, the common law has long held that losing a foretooth is a sufficiently serious injury for maiming.¹⁶⁴ Although this type of injury also could constitute maiming under the current military statute,¹⁶⁵ the injury does not necessarily amount to grievous bodily harm as defined by military law.¹⁶⁶ On the other hand, most maiming-type injuries clearly would constitute grievous bodily harm. *Thompson* suggests only that the extent of the injury, for purposes of maiming and aggravated assault, must be considered independently in each case.

Another recognized lesser-included offense of maiming is attempted maiming.¹⁶⁷ To be guilty of this offense, the accused must have had a specific intent to maim—not merely to injure. This enhanced mental state is consistent with the *mens rea* requirement for other attempts under military law.¹⁶⁸

Unlike certain assaultive crimes, which can be lesser-included offenses to maiming, case law holds that maiming and robbery are distinct offenses that are punishable

¹⁵⁷2 W. LaFave & A. Scott, *supra* note 8, § 6.8(e) (emphasis in original) (footnotes omitted).

¹⁵⁸See *United States v. Washington*, 1 M.J. 473 (C.M.A. 1976); MCM, 1984, Part IV, paras. 5c(8), 5e.

¹⁵⁹See *Callanan v. United States*, 364 U.S. 587, 593-94 (1961).

¹⁶⁰*Cf.* MCM, 1984, Part IV, para. 5c(3); *United States v. Crocker*, 18 M.J. 33 (C.M.A. 1984) (Wharton's Rule applies generally in the military).

¹⁶¹MCM, 1984, Part IV, para. 50d. The complete list of lesser included offenses is assault, assault consummated by a battery, assault with a dangerous weapon, assault intentionally inflicting grievous bodily harm, and attempts. Curiously, assault with a means or force likely to produce death or grievous bodily harm is not listed; presumably, this is included within assault with a dangerous weapon. See UCMJ art. 128(b)(1) (includes both assault with a dangerous weapon and assault with a means likely to produce grievous bodily harm).

¹⁶²See *supra* notes 101-05 and accompanying text.

¹⁶³The 1984 Manual defines grievous bodily harm as follows: "Grievous bodily harm means serious bodily injury. It does not include minor injuries, such as a black eye or bloody nose, but does include fractured or dislocated bones, deep cuts, torn member of the body, serious damage to internal organs, and other serious bodily injuries." MCM, 1984, Part IV, para. 54c(4)(iii).

¹⁶⁴See 4 W. Blackstone, *supra* note 9, at 205-06; see also *Keith v. State*, 89 Tex. Crim. 264, 232 S.W. 321 (1921).

¹⁶⁵The traditional reasoning in support of finding that maiming occurred was that the loss of a foretooth (but not a jaw tooth) diminished the victim's military effectiveness. This reasoning seems outdated in the modern world. Moreover, given the advanced dental techniques that are now commonplace, but were unheard of in Blackstone's time, a question arises whether such an injury still constitutes maiming. Actually, one hardly can say that the loss of a foretooth diminishes the victim's vigor or ability to fight, is permanently incapable of being corrected, or necessarily must detract from the victim's comeliness.

¹⁶⁶See *supra* note 163 (providing 1984 Manual's definition of grievous bodily harm). Note that although losing a foretooth is not listed specifically as amounting to grievous bodily harm under the Manual's definition of the term, the list of injuries is not intended to be exhaustive and expressly includes "other serious bodily injuries." MCM, 1984, Part IV, para. 54c(4)(iii).

¹⁶⁷MCM, 1984, Part IV, para. 50d.

¹⁶⁸See *United States v. Allen*, 21 M.J. 72 (C.M.A. 1985); *United States v. Roa*, 12 M.J. 210 (C.M.A. 1982) (attempted murder requires a specific intent to kill, although murder under UCMJ articles 118(2) and 118(3) can be committed when the accused intends to inflict great bodily harm or knowingly commits an act that is inherently dangerous to others and evinces a wanton disregard for human life); see also *United States v. Sampson*, 7 M.J. 513 (A.C.M.R.), *pet. denied*, 7 M.J. 468 (C.M.A. 1979) (although rape is a general intent crime, attempted rape is a specific intent crime).

separately, even if they occur during the same transaction. This result is supported by the traditional tests for multiplicity under military law.¹⁶⁹ The result also is consistent with the more recent test for multiplicity established by the Court of Military Appeals, provided that the allegation in the robbery specification does not "fairly embrace" the maiming charge.¹⁷⁰

Because maiming and robbery are separate offenses, a specification drafted to allege both would be duplicitous.¹⁷¹ The usual remedy for a duplicitous specification is severance.¹⁷² Severance, however, would increase the maximum punishment faced by the accused. Accordingly, a motion to sever by the defense generally would be ill-advised.¹⁷³ Nevertheless, even if only one offense is charged—either maiming or robbery—all of the aggravating misconduct by the accused during the course of the criminal transaction could come before the court during presentencing.¹⁷⁴

Conclusion

Maiming has become virtually a dead-letter offense under military law. With the increasing number of child abuse, domestic violence, and related cases being tried by courts-martial, however, the trend instead should be toward greater use of this statute. The government's apparent hesitancy to charge maiming—although partly explained by its demanding and unusual requirements of proof—also must be attributed to a prevailing, general

lack of familiarity with the offense among military practitioners.

The failure to charge, instruct upon, and convict for maiming often has several unfortunate consequences. Chief among these is that the accused may escape criminal responsibility and may not be punished consistent with the gravity of his misconduct. When an accused maims, but is charged with only aggravated assault, the allegation of his or her criminal culpability is understated. Similar difficulties arise when an accused is charged with a greater offense than maiming, but the military judge fails to instruct upon maiming when it is raised by the evidence as a lesser-included offense. In these circumstances, the members are forced to decide whether to convict the accused of a greater offense that he or she may not have committed, acquit the accused when he or she obviously has engaged in some grave crime, or find the accused guilty of a less serious offense that fails to account for the seriousness of his or her misconduct.

Justice Holmes once observed that the law should be structured so that it comports with the feelings and demands of the community.¹⁷⁵ Ensuring that the maiming statute is used properly within the military justice system—consistent with its intended role in the hierarchy of violent crimes prohibited by UCMJ—would help achieve this important goal.

¹⁶⁹ See *supra* notes 118-20.

¹⁷⁰ See *United States v. Baker*, 14 M.J. 361 (C.M.A. 1983); see also *United States v. Stottlemire*, 28 M.J. 477 (C.M.A. 1989) (conspiracy to commit larceny and attempted larceny of the same funds were not multiplicitous for findings when each offense required proof of a separate element and the overt acts alleged and proven in each charge were clearly different); *United States v. Flynn*, 28 M.J. 218 (C.M.A. 1989) (assault with intent to commit rape and assault with intent to commit sodomy upon the same victim during the same transaction were not multiplicitous for findings when the offenses were separated by a brief time and the accused harbored distinct criminal intents).

¹⁷¹ MCM, 1984, Rule for Courts-Martial 307(c)(4) ("Each specification shall state only one offense."). See generally *United States v. Hiatt*, 27 M.J. 818 (A.C.M.R. 1988).

¹⁷² See R.C.M. 906(b)(5).

¹⁷³ See *Hiatt*, 27 M.J. at 820. The defense also could make a motion to strike a portion of the specification under R.C.M. 906(b)(4), but a military judge's granting this motion under these circumstances is unlikely.

¹⁷⁴ See R.C.M. 1001(b)(4) ("The trial counsel may present evidence as to any aggravating circumstances directly relating to or resulting from the offenses of which the accused has been found guilty."); *United States v. Wingart*, 27 M.J. 128 (C.M.A. 1988); *United States v. Hall*, 29 M.J. 786 (A.C.M.R. 1989).

¹⁷⁵ O. Holmes, *The Common Law* 57 (1881).

United States v. Hedges: Pitfalls in Counseling Prospective Retirees Regarding Negotiating for Employment

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Introduction

To an ethics counselor,¹ few areas are as challenging or as fraught with legal danger as guiding prospective

retirees through the maze of statutes and regulations governing postemployment restrictions. The law is complex,

¹ Ethics Counselors, formerly known as Standards of Conduct Counselors, are required to be designated for "all ARSTAF agencies, field operating agencies, separate activities, installations, and commands authorized a commander in the pay grade O-7 or above." Army Reg. 600-50, Standards of Conduct for Department of the Army Personnel, para. 2-9a (26 Jan. 1988) [hereinafter AR 600-50]. For convenience, this article will use only the term "ethics counselor."

overlapping,² in flux,³ and couched in nearly impenetrable jargon. Compounding the problem, the prospective retiree who seeks counseling may have plans that are so ill-defined that useful, tailored advice is difficult. Alternatively, he or she already may have "contacted" prospective government contractor employers and may not tell the ethics counselor about this contact, even if specifically asked.

This article addresses the issues posed in the recently decided case of *United States v. Hedges*.⁴ These issues, in particular, illustrate the problems that arise when a prospective retiree and the ethics counselor fail to recognize, address, and document a "negotiation for employment" situation and do not take appropriate disqualification steps.⁵ The article then highlights some observations from the Procurement Fraud Division's Corruption Case Program⁶ and reviews the law covering prospective retirees' negotiating for employment. The article concludes by analyzing these issues, observations, and law to point out problems that the ethics counselor may encounter and to suggest some ways that Army ethics counselors—who must advise prospective retirees—and Army Procurement Fraud Advisors⁷—who must analyze possible violations of conflicts of interest laws—can deal with them.

Colonel Hedges' "Negotiation for Employment"

The *Hedges* case involved a negotiation for employment situation by an Air Force officer. Employment negotiations by government employees and officers with government contractors is tightly controlled by statute⁸ and regulation.¹⁰ These authorities proscribe officers and civilian employees from personally and substantially participating in any particular matter with an organization with which they are negotiating for

employment if that organization has a financial interest in that particular matter.

Colonel Hedges had been the commander and program manager of the Air Force Automated System Project Office since July 1981. He was responsible for various computer and communications network programs and also served as chairman of the source selection evaluation board for one of the programs. Sperry Corporation (Sperry) was involved with two of Colonel Hedges' programs. It was a potential bidder on one program, which had an estimated life-cycle cost of between four and five billion dollars, and it was the prime contractor on the other program, which had an estimated life-cycle cost of one billion dollars. In January 1984, Colonel Hedges notified his superiors of his decision to retire and he successfully sought permission to work in the private sector during his sixty-day terminal leave period—2 June to 1 August 1984.

In April 1984, Colonel Hedges spoke with Mr. Traylor, the Sperry Corporation counterpart on one of his programs, and mentioned his impending retirement. Colonel Hedges asked for, and received from, Mr. Traylor general retirement advice. Despite Colonel Hedges' expressed disinterest in working for Sperry or in doing consulting work, Mr. Traylor told Colonel Hedges to give Sperry an opportunity to hire him if he decided to go into the data processing industry. Unknown to Colonel Hedges, and despite his expressed disinterest in either working for Sperry or consulting, Mr. Traylor had a draft consulting agreement prepared in case Colonel Hedges changed his mind. In mid-May, Colonel Hedges actually did change his mind about consulting, and told Mr. Traylor that he might be interested in working for Teledyne or CompuSec. Mr. Traylor expressed Sperry's continued interest in employing Colonel Hedges, but Colonel Hedges did not respond.

²See *id.* figure 1-1 (Summary of Postemployment Restrictions).

³See, e.g., Ethics Reform Act of 1989, Pub. L. No. 101-194, 103 Stat. 1759 (1989) (suspending the following statutes until 30 November 1990: 41 U.S.C. § 423 (procurement integrity provisions of the Office of Federal Procurement Policy Act Amendments of 1988); 10 U.S.C. § 2397a (requiring certain procurement officials to report future employment contacts with contractors); 10 U.S.C. § 2397b (barring certain procurement officials from receiving compensation from some contractors for two years); and 18 U.S.C. § 281 (criminally banning retired officers from selling to their former service)); National Defense Authorization Act for Fiscal Year 1991, Pub. L. No. 101-510 (1990) (allowing other procurement integrity provisions to take effect on 1 December 1990, but continuing suspension of the following statutes: 10 U.S.C. §§ 2397a, 2397b; 18 U.S.C. § 281; and 41 U.S.C. § 423(f) (postemployment restrictions of the Procurement Integrity Act)).

⁴912 F.2d 1397 (11th Cir. 1990).

⁵See 18 U.S.C. § 208 (1988); AR 600-50, paras. 2-10, 2-11.

⁶Procurement Fraud Division's Litigation Branch reviews and coordinates remedies for Army cases involving bribery, gratuities, and conflicts of interest.

⁷See Army Reg. 27-40, Legal Services: Litigation, chap. 8 (2 Dec. 1987) (101 27 Nov. 1989) (Remedies in Procurement Fraud and Corruption) [hereinafter AR 27-40].

⁸*Hedges*, 912 F.2d at 1398-1400.

⁹See 18 U.S.C. § 208 (1988).

¹⁰See generally AR 600-50.

On 29 May 1984, Colonel Hedges and Mr. Traylor again discussed the possibility of Colonel Hedges' being employed by Sperry. Mr. Traylor then told Colonel Hedges that he was preparing to send him a consulting agreement. Mr. Traylor told Colonel Hedges that his salary range would be about \$65,000. Colonel Hedges, however, said that he expected \$75,000. Mr. Traylor stated that he had no authority to hire Colonel Hedges, but that he thought his superiors at Sperry would approve the salary requirement. Mr. Traylor also mentioned that Colonel Hedges' supervisor would be the Sperry program manager for one of the programs under Colonel Hedges' responsibility. Colonel Hedges, however, told Mr. Traylor that he was receiving guidance from his ethics counselor,¹¹ and he would not accept employment until the counselor had reviewed the consulting agreement for compliance with conflicts of interest laws and regulations.

Colonel Hedges received the consulting agreement on 31 May. On 1 June, he submitted the agreement to his ethics counselor, who reviewed it, made changes to it, and returned it to Colonel Hedges. According to the court of appeals, the ethics counselor "did not tell Hedges that the consulting agreement should not be discussed with Sperry, nor did he tell Hedges to wait until his terminal leave began in 24 hours, at which time employment negotiations could proceed without violating any statutes or regulations."¹²

On 2 June, Colonel Hedges went on terminal leave; on 8 June, he signed the agreement; and on 11 June, he started working for Sperry.

"Personal and Substantial"¹³ Participation

The government alleged that Colonel Hedges personally and substantially participated in the matters of Sperry Corporation while he was negotiating for employment. On 17, 21, 23, 25, and 31 May, and on 1 June, Colonel Hedges signed contract change proposals on the contract for which Sperry was the prime contractor. On 14 and 25 May, he approved a report and decision memorandum and on 24 May, he attended a briefing on the request for proposal on which Sperry was a potential bidder. According to the court of appeals "these actions did not result in the payment of any money to Sperry or pertain to the

award of any contract and were in the best interests of the Air Force since they resulted in substantial savings to the Air Force."¹⁴

Construing 18 U.S.C. Section 208 and "Negotiating for Employment"

Colonel Hedges was convicted of taking official actions on matters in which Sperry had a financial interest while he was negotiating for employment with Sperry, in violation of 18 U.S.C. section 208(a). He was sentenced to a \$5000 fine. The court of appeals' discussion of the statute and Colonel Hedges' defenses illustrate several points of interest to ethics counselors and procurement fraud advisors.

First, the court of appeals stated that the statute requires neither actual corruption, nor loss by the government, to sustain a conviction. Rather, 18 U.S.C. section 208 is a "strict liability offense"¹⁵ that "sets forth an objective standard of conduct which is directed not only at dishonor, but also at conduct which tempts dishonor."¹⁶ The court found that the only scienter requirement in the statute is the defendant's knowledge "that the person with whom he was negotiating concerning employment had a financial interest in the defendant's official work."¹⁷ The government is not required to prove that the defendant knew he was negotiating for employment. Actually, the court of appeals stated that a defendant "should know" when he or she is negotiating for employment.¹⁸

At trial, Colonel Hedges contended unsuccessfully that his talks with Mr. Traylor were not negotiations, but rather "preliminary and exploratory actions." On appeal, Colonel Hedges contended the statute was void for vagueness as applied to his conduct. Specifically, he asserted that he did not know he was negotiating within the meaning of 18 U.S.C. section 208. The court rejected this notion—particularly because of the discussion between Colonel Hedges and Mr. Traylor over salary amounts on 29 May.¹⁹ Dashing the hopes of ethics counselors and prospective retirees searching for a bright-line rule, the court then stated that "negotiation is to be given its common everyday meaning" and found the issue of what constitutes negotiation to be a fact question for the jury to answer.²⁰

¹¹ Colonel Hedges' ethics counselor—then known as a standards of conduct counselor—actually was his subordinate. See *Hedges*, 912 F.2d at 1405; see also *supra* note 1.

¹² See *Hedges*, 912 F.2d at 1399-1400.

¹³ See 18 U.S.C. § 208(a) (1988) (prohibiting personal and substantial participation as a government official with an entity with which the official is negotiating for employment).

¹⁴ *Hedges*, 912 F.2d at 1399.

¹⁵ *Id.* at 1400.

¹⁶ *Id.* at 1402.

¹⁷ *Id.* at 1401.

¹⁸ *Id.*

¹⁹ *Id.* at 1403.

²⁰ *Id.* at 1403-04.

Entrapment by Estoppel

At trial, Colonel Hedges testified that he told his ethics counselor in early 1984 that he wanted advice on his preretirement actions; that he told his counselor about his conversations with Mr. Traylor; that he received specific clearance for his 23 May Washington briefing on the request for proposal on which Sperry was bidder; and that his ethics counselor was in the room when he was discussing the consulting agreement on the telephone with a Sperry attorney. In general, the tenor of his testimony was that he had sought and received preretirement and postretirement advice, but he never was told by his ethics counselor that his preretirement actions might violate conflicts of interest prohibitions.²¹

The ethics counselor testified in rebuttal, denying that he had specific or general discussions of preretirement activities with Colonel Hedges. Only postretirement advice was sought or given. He did, however, support the defense when he testified that he did not tell Colonel Hedges to avoid discussions with Sperry until his terminal leave began on 2 June, that Colonel Hedges was sensitive to conflicts of interest matters, and that Colonel Hedges "was a man of outstanding character and of the highest personal integrity."²²

Colonel Hedges unsuccessfully requested an instruction that reasonable reliance upon a public official's legal advice is a defense—that is, entrapment by estoppel. Instead, the trial court gave an instruction that reflects the generally accepted view that advice of counsel is no defense to a strict liability offense.²³

The United States Court of Appeals for the Eleventh Circuit reversed because of the trial court's failure to instruct on the defense theory of the case. The court of appeals stated that "entrapment by estoppel applies when an official tells a defendant that certain conduct is legal and the defendant believes that official."²⁴ The court

found that Colonel Hedges' testimony that he sought and received preretirement advice sufficiently raised the defense. The credibility of that testimony, and the conflict with the ethics counselor's rebuttal that only postretirement advice was sought or given, was a jury question.

Analyzing entrapment by estoppel, the court of appeals had little trouble with the concept that an ethics counselor is a public official who, by regulation, is charged with advising personnel on conflicts of interest matters—a view consistent with the Department of Defense's regulatory scheme.²⁵ An ethics counselor is the government's representative and a prospective retiree seeking counseling is not the ethics counselor's client.

After it considered the issue of whether the ethics counselor is a public official, the applicability of the entrapment by estoppel defense was readily apparent to the court. The defense is grounded in notions of fairness and due process, and seeks to protect a defendant from unintentional entrapment by an official who mistakenly misleads the defendant to violate the law. An oft-cited early Supreme Court case, *Cox v. Louisiana*,²⁶ is illustrative. Cox was told by a chief of police that he could hold a demonstration at a specific location near the courthouse. In reversing Cox's conviction for picketing "near" a courthouse, the Court stated that, under the circumstances, sustaining the conviction "would be to sanction an indefensible sort of entrapment by the State."²⁷

Whether Colonel Hedges had a legitimate entrapment by estoppel defense is questionable because, even by his own testimony, he apparently did not specifically request particular advice on whether he was "negotiating for employment" with Sperry. Nor did he request advice on how he properly could "negotiate for employment" with Sperry using the available disqualification procedures.²⁸ This issue, therefore, clearly illustrates the problems and challenges of preretirement counseling. An implication of

²¹ *Id.* at 1404.

²² *Id.*

²³ *Id.* See generally E. Devitt & C. Blackmar, Federal Jury Practice and Instructions § 14.12 (3d ed. 1977) (delineating instruction that advice of counsel may negate element of willfulness). Although advice of counsel is no defense to a strict liability offense, it may be relevant to issues of willfulness or knowledge in certain offenses.

²⁴ *Hedges*, 912 F.2d at 1405-06.

²⁵ Dep't of Defense Directive 5500.7, Standards of Conduct, para. E.2 (C2, 11 Oct. 1988) [hereinafter DOD Dir. 5500.7]; AR 600-50, para. 2-9.

²⁶ 358 U.S. 413 (1958).

²⁷ *Id.* at 586 (citing *Raley v. Ohio*, 79 S. Ct. 1257 (1959)). *Cox v. Louisiana* and the principle of entrapment by estoppel has had only indirect recognition in military law. See *United States v. Clardy*, 13 M.J. 308, 317 (C.M.A. 1982) (court's overruling of own precedent given prospective application to preclude detrimental reliance); *United States v. McGraner* 13 M.J. 408, 418 (C.M.A. 1982) (no detrimental reliance by accused on regulatory court-martial processing guidelines). These cases, while citing *Cox*, illustrate forms of equitable estoppel when reliance is on case law, statute, or regulations, rather than on the advice of a public official. See generally Sevilla, "They Said I Could": The Defense of Equitable Estoppel, *The Champion*, June 1990, at 7.

²⁸ See, e.g., AR 600-50, para. 2-11g.

the Eleventh Circuit's decision, however, is that the ethics counselor's silence, when faced with evidence that Colonel Hedges was "negotiating for employment" with Sperry, may have been sufficient to mislead Colonel Hedges to violate the law if he actually had requested preretirement advice.

Practical Implications: Preventing Offenses Instead of Creating Defenses

Hedges illustrates several problems inherent in the counseling of prospective retirees by ethics counselors. Ethics counselors must be mindful to protect the government,²⁹ the prospective retiree,³⁰ and the prospective retiree's potential employer³¹ from the many legal difficulties that can arise from these situations.

First, the ethics counselor must remember that his or her client is the government—not the prospective retiree. The regulatory framework for giving advice to prospective retirees guides the retiree to ethics counselors who, by regulation, may not form an attorney-client relationship and to whom disclosures are not confidential or privileged.³² Disclosures not only are unprotected, but also the Army ethics counselor has an affirmative obligation to report suspected violations to the Criminal Investigation Command; the Administrative Law Division, Office of The Judge Advocate General (OTJAG); the Army General Counsel; and the Procurement Fraud Division, OTJAG, as appropriate.³³

Army Regulation 600-50, prudence, and sound ethical practice suggest that the ethics counselor notify the prospective retiree up-front about who the ethics counselor

represents and that communications are not confidential or privileged.³⁴ While seemingly awkward, this type of immediate notification is decidedly less awkward than testifying against the prospective retiree or notifying appropriate authorities of suspected violations. The prospective retiree also should be advised explicitly to consult with his or her own attorney if the need to communicate confidentially arises.³⁵

In addition to clarifying who the client is, ethics counselors must know what "negotiating" means. Leaving it to the litigants at trial to take their "best shot" with a federal jury on what "negotiating" is may not be a gratifying experience for the ethics counselor or the prospective retiree he or she advised. In *Hedges* the trial court gave an instruction that ruled out participation in "preliminary and exploratory talks" as "negotiation." Instead, the court found "negotiation" to require a "process of submission and consideration of offers."³⁶

From a preventive law and ethics counseling point of view, the relatively protective and restrictive language of Army Regulation 600-50 is more useful than the court's discussion. The regulation defines "negotiating" as "any action ... that reasonably could be construed as an indication of interest including sending letters or resumes, making telephone inquiries, or failing to reject a personally directed proposal from [an] entity's representative regarding future employment. It is not necessary that there be any firm offer of employment."³⁷ Some conduct, such as preliminary talks, may violate Army Regulation 600-50, but not violate the Eleventh Circuit's interpretation of the statute.

²⁹ Aside from the costs of investigating and reviewing allegations for criminal and other remedies, conflicts of interest violations and appearances of violations can create significant contract formation and administration problems. See, e.g., 18 U.S.C. § 218 (1988) (contract obtained in violation of conflicts of interest law voidable upon conviction); Comp. Gen. Dec. No. B-238768.2 (19 Oct. 1990) (telephone calls by former employee on behalf of awardee could be construed as conflicts of interest violations and created an appearance of impropriety, justifying terminating the contract).

³⁰ If the misconduct is discovered before retirement, the military member or civilian employee faces the usual range of administrative or disciplinary measures available to their commander or supervisors. Even after leaving government service, however, the former member or employee still faces possible criminal prosecution in federal court; civil penalties up to \$50,000, see 18 U.S.C. § 216 (b) (1988); administrative enforcement proceedings, see AR 600-50, para. 5-4; (proceedings for violations of 18 U.S.C. § 207 (1988) and 10 U.S.C. §§ 2397, 2397a, 2397c (1988)); statutory debarment, see 10 U.S.C. § 2408 (1988) (prohibiting a person convicted of a felony arising out of a Department of Defense contract from holding certain positions); and regulatory suspension and debarment, see Federal Acquisition Regulation 9-4 [hereinafter FAR].

³¹ See, e.g., Defense Fed. Acquisition Reg. Supp. 203.7000 (stating policy that government contractor's management controls should provide for disciplinary action for improper employee conduct); FAR 52.204-5 (requiring offerors to certify that the offeror and its principals have not been suspended or debarred).

³² AR 600-50, para. 2-9d.

³³ *Id.* para. 2-10.

³⁴ See *id.* para. 2-d; Dep't of Army Pam. 26-26, Legal Services: Rules of Professional Conduct for Lawyers, Rule 1.13d (31 Dec. 1987) (Army attorney not representing an individual should explain identity of the Army as client).

³⁵ *Id.* rule 1.13 comment.

³⁶ See *Hedges*, 912 F.3d at 1403, n.2.

The instruction was: "negotiation is a communication between two parties with a view to reaching an agreement." Negotiation connotes discussion and active interest on both parties. Preliminary and exploratory talks do not constitute negotiation. Further, to find a negotiation, you must find that this was a process of submission and consideration of offers.

³⁷ AR 600-50, para. 2-10(1).

The more restrictive regulatory language, however, better serves the system and the prospective retiree. Part of comprehensive counseling, including disqualification advice, requires all parties to have a clear understanding of the agency's view of the propriety of the employment negotiations. Furthermore, should a criminal or regulatory enforcement official³⁸ take a different view, the parties are better protected by notions of good faith compliance and entrapment by estoppel.

Finally, ethics counselors must recognize the prospective retiree's fluid situation. As *Hedges* illustrates, the prospective retiree's situation is dynamic and problems may arise suddenly. What originally was proper and timely advice may be overtaken by events extremely rapidly. In addition, the prospective retiree may not disclose all the facts or his intentions. Fact disclosure may be curtailed even further once the ethics counselor discloses that their communications are not confidential or privileged. The prospective retiree also may interpret silence by the ethics counselor as approval—that is, if the ethics counselor did not say specifically that doing something was wrong, it must be all right. Accordingly, the unfortunate complexity of conflicts of interest prohibitions, combined with the fluidity of retirees' situations and attendant communications problems, creates a recipe for disaster.

The ethics counselor's taking certain steps, however, may avoid that apparently inevitable disaster. First, nego-

tiation for employment and disqualification advice should be given *each time* a prospective retiree comes for *any* conflicts of interest advice. Giving advice every time keeps up with the changing situation and precludes unspoken assumptions of approval by silence. Second, ethics counselors should give written advice that restates the facts, if any, upon which the advice is based.³⁹ Even if no "negotiating for employment" facts are given, the rendering of written advice is important to record the fact that no "negotiating" facts were revealed and that general advice—including the regulatory definition of "negotiating"—was provided. This type of written advice not only serves as a reminder to the prospective retiree, but also protects all parties.

Conclusion

Because of the turbulence in the law and the dynamic factual situations typical in this area, counseling prospective retirees requires extraordinary skill, thoroughness, and patience by the advising ethics counselor. The investigative and other costs to the government; the disruption of procurements; and possibility of suspension, debarment, or job loss to the retiree can be a heavy price to pay for all concerned parties. While criminal prosecutions may be relatively few,⁴⁰ ethics counselors must be vigilant in recognizing, addressing, and documenting "negotiation for employment" issues and in keeping the prospective retiree fully and properly informed of his or her ethical obligations.

³⁸These individuals may include Department of Justice officials or a suspension and debarment official.

³⁹See AR 600-50, para. 2-9c(1) ("Except for simple repetitious cases, assistance will be documented by means of written memorandums.").

⁴⁰The Office of Government Ethics reported only eight conflicts of interest prosecutions in the 15-month period from October 1988 to December 1989. Memorandum from Stephen D. Potts, Director, Office of Government Ethics, to Designated Agency Ethics Officials and Inspectors General, subject: Conflict of Interest Prosecutions (Aug. 29, 1990).

USALSA Report

United States Army Legal Services Agency

The Admissibility of Videotaped Testimony at Courts-Martial

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United States Army Court of Military Review

Videotaped testimony is being used with increasing frequency as a substitute for live, in-court testimony in

the area of child sexual abuse. Forty-five states have statutes that specifically permit the use of a procedural sub-

stitute for a child's in-court testimony under certain limited conditions.¹ The constitutionality of these statutes was considered by the United States Supreme Court in *Maryland v. Craig*² and *Coy v. Iowa*³ with different results. The distinction turned on the fact that the Maryland statute, which was upheld, required a case-specific finding that the child witness would be so traumatized by the defendant's presence that he or she would be unable to communicate reasonably.

Contrary to the trend in state courts, the military provides no clear-cut guidelines. Cases involving the admissibility of a videotaped statement have been decided on an *ad hoc* basis. The purpose of this article is to examine the constitutional and evidentiary requisites for admissibility of videotaped testimony and to offer practical suggestions for consideration by military trial advocates.

Videotaped statements can be divided into two distinct categories: (1) litigative statements taken with the intention of being used in lieu of the declarant's live testimony at trial;⁴ and (2) investigative statements taken by a government agent or social worker as part of a criminal investigation.⁵ Because each of the two categories presents different issues, they will be analyzed separately.

Litigative Videotapes

In *Craig* the United States Supreme Court provided clear guidance on the requirements of the confrontation clause. First, *Craig* held that the right to a face-to-face

meeting is not absolute, but it is so basic to our concept of fairness that any attempt to abrogate that right requires a strong, case-specific showing of necessity. Second, to support a finding of necessity, the trial judge must hear evidence and determine that the child would be so traumatized by the presence of the accused that the child's ability to communicate would be impaired. Third, the procedural substitute for in-court testimony must preserve every element of the confrontation clause other than face-to-face contact. Specifically, the child's testimony must be subjected to "rigorous adversarial testing"⁶ under oath and must be observable by the accused, the judge, and the trier of fact.⁷

The *Craig* opinion raises several questions: How is trauma to be determined? Is an opinion by a social worker sufficient evidence? What is meant by an "impaired" ability to communicate? Must the trial judge search for the least restrictive alternative? Justice O'Connor, writing for the Court, specifically declined to establish any "categorical evidentiary prerequisites," but suggested that a finding of necessity would be strengthened by measures such as the judge's personal observations of the child while in the presence of the accused. Moreover, the opinion states in strong language that the child's distress over having to testify must be more than *de minimus*. In particular, it must be caused by the presence of the accused rather than the courtroom atmosphere, and it must be greater than the trauma suffered from abused children in general. This language, together with Justice Scalia's strongly worded dissent—in which he was joined by Justices Brennan, Marshall,

¹See Ala. Code § 15-25-2 (Supp. 1989); Alaska Stat. Ann. § 12.45.046 (Supp. 1989); Ariz. Rev. Stat. Ann. §§ 13-4251, 4253(B), 4253(C) (1989); Ark. Code Ann. § 16-44-203 (1987); Cal. Penal Code Ann. § 1346 (West Supp. 1990); Colo. Rev. Stat. §§ 18-3-413, 18-6-401.3 (1986); Conn. Gen. Stat. § 54-86g (1989); Del. Code Ann., tit. 11, § 3511 (1987); Fla. Stat. § 92.53 (1989); Ga. Code Ann. § 17-8-55 (Supp. 1989); Haw. Rev. Stat. ch. 626, Rule Evid. 616 (1985); Idaho Code § 19-3024A (Supp. 1989); Ill. Rev. Stat., ch. 38, § 106A-2 (1989); Ind. Code § 35-37-4-8(c), (d), (f), (g) (1988); Iowa Code § 910A.14 (1987); Kan. Stat. Ann. § 38-1558 (1986); Ky. Rev. Stat. Ann. § 421.350(4) (Baldwin Supp. 1989); La. Rev. Stat. Ann. § 15:283 (West Supp. 1990); Md. Cts. & Jud. Proc. Ann. § 9-102 (1989); Mass. Gen. Laws Ann., ch. 278, § 16D (Supp. 1990); Mich. Comp. Laws Ann. § 600.2163a(5) (Supp. 1990); Minn. Stat. § 595.02(4) (1988); Miss. Code Ann. § 13-1-407 (Supp. 1989); Mo. Rev. Stat. §§ 491.675-491.690 (1986); Mont. Code Ann. §§ 46-15-401 to 46-15-403 (1989); Neb. Rev. Stat. § 29-1926 (1989); Nev. Rev. Stat. § 174.227 (1989); N.J. Rev. Stat. § 2A:84A-32.4 (Supp. 1989); N.H. Rev. Stat. Ann. § 517:13-a (Supp. 1989); N.M. Stat. Ann. § 30-9-17 (1984); N.Y. Crim. Proc. Law §§ 65.00-65.30 (McKinney Supp. 1990); Ohio Rev. Code Ann. § 2907.41(A), (B), (D), (E) (Baldwin 1986); Okla. Stat. tit. 22, § 753(c) (Supp. 1988); Ore. Rev. Stat. § 40.460(24) (1989); 42 Pa. Cons. Stat. §§ 5982, 5984 (1988); R.I. Gen. Laws § 11-37-13.2 (Supp. 1989); S.C. Code § 16-3-1530(G) (1985); S.D. Codified Laws § 23A-12-9 (1988); Tenn. Code Ann. § 24-7-116(d), (e), (f) (Supp. 1989); Tex. Crim. Proc. Code Ann., art. 38.071, § 4 (Vernon Supp. 1990); Utah Rule Crim. Proc. 15.5 (1990); Vt. Rule Evid. 807(d) (Supp. 1989); Va. Code § 18.2-67-9 (1988); Wis. Stat. Ann. § 967.04(7) to (10) (West Supp. 1989); Wyo. Stat. § 7-11-408 (1987).

²*Maryland v. Craig*, 110 S. Ct. 3157 (1990) (statutory procedure permitting judge to receive testimony via closed circuit television is not violative of confrontation clause when procedure can be invoked only upon case-specific finding of necessity).

³*Coy v. Iowa*, 108 S. Ct. 2798 (1988) (placement of screen between defendant and child sexual assault victims during trial testimony, when statute created presumption of trauma to class of victims, violated appellant's confrontation rights).

⁴For purposes of this article, both prerecorded videotapes and simultaneous broadcast via closed circuit television are considered to be substitutes for live, in-person testimony.

⁵Note, *Videotaping Children's Testimony: An Empirical View*, 85 Mich. L. Rev. 809, 823-24 (1987).

⁶*Craig*, 110 S. Ct. at 3159.

⁷*Id.*

and Stevens—suggests that the necessity exception should be interpreted narrowly and that the government must provide strong evidentiary support.

Expert testimony, while not required by *Craig*, certainly would assist the court in determining whether a child's distress was caused by the presence of the accused, rather than by the prospect of testifying in public about embarrassing events.⁸ Furthermore, a determination of trauma is insufficient if "based on nothing more than an expert's testimony that all child witnesses in sex abuse cases are vulnerable,"⁹ because it would fail to comport with the "individualized finding" required by *Coy*.¹⁰

The degree of trauma sufficient to "impair" the child's ability to communicate was not defined clearly in *Craig*. Presumably, the requirement would be satisfied by showing that the child is unable to communicate clearly, effectively, and coherently in the presence of the accused. *Craig* left the means of proof of impairment to the discretion of the trial court. A child's difficulty in testifying in the accused's presence at a pretrial hearing¹¹ certainly would be probative of an impaired ability to communicate, but it is by no means the only manner of proof. Expert testimony may be relied upon, provided it addresses the distress suffered by the individual child, and it distinguishes between trauma caused by the accused's presence and the child's general discomfort with appearing in court.

The pre-*Craig* case of *New Jersey v. Sheppard*¹² provides an excellent example of the depth of testimony that is contemplated by *Craig*. In *Sheppard* a forensic psychiatrist testified that a child witness who was receiving both group and individual therapy would likely suffer long-term effects such as nightmares, depression, eating and sleeping disorders, behavioral difficulties, and sexual promiscuity. The psychiatrist also opined that the accuracy of the child's testimony would be improved by avoiding a face-to-face contact because the child's mixed

emotions toward the accused would tend to mitigate the truth.

Alternative procedures can be implemented only after the trial court has determined that face-to-face confrontation would result in trauma sufficient to impair the child's ability to communicate. The procedure used—whether the testimony is prerecorded via videotape or simultaneously broadcast via closed circuit television—must provide for "rigorous adversarial testing in a manner functionally equivalent to that accorded live, in-person testimony."¹³ This phrase has been interpreted as requiring an opportunity for cross-examination by the accused's defense counsel and some means whereby the accused can hear the child's testimony and pose additional questions while the child is under oath.¹⁴ At some point during the trial, the child's demeanor under direct and cross-examination must be observable by the trier of fact.¹⁵

Compliance with the requirements set forth in *Craig* should not present a problem to courts-martial, provided the child is available to testify. The difficulties arise when the custodial nonmilitary parent flees the jurisdiction with the child witness and refuses to return for trial. Under these circumstances, the prerequisite for admissibility of a litigative-type videotape—that is, a case-specific finding of trauma by the military judge—cannot be met. Other videotaped statements by the child, to include his or her testimony at a Uniform Code of Military Justice (UCMJ) article 32 hearing,¹⁶ may be admissible under the "former testimony" exception to the hearsay rule as out-of-court statements.¹⁷ They would not be admissible, however, as procedural alternatives to in-court testimony under *Craig*.

Because a parent's absconding with the child in these cases is not uncommon, a prudent trial counsel should consider the evidentiary requirements well prior to referral. Early arrangements should be made for the child's examination by a psychiatrist or clinical psychologist. If

⁸*Minnesota v. Conklin*, 45 Crim. L. Rep. (BNA) 2399 (Sept. 6, 1989) (finding by trial judge that child lacked recollection, was nervous, and was unwilling to testify falls short of *Coy* requirement of "individualized finding" and of statutory requirement that trauma be caused by the defendant's presence); see also *New Jersey v. Crandall*, 47 Crim. L. Rep. (BNA) 1412 (Aug. 22, 1990) (statute requires trial judge to "conduct a thorough face-to-face interview with the child and make detailed findings concerning the child's objective manifestations of fear.... If ... a court is unable to make a determination on its own, it may appoint an expert to evaluate the child.").

⁹*New York v. Henderson*, 47 Crim. L. Rep. (BNA) 1116 (May 9, 1990).

¹⁰*Coy*, 108 S. Ct. at 2798.

¹¹See Uniform Code of Military Justice art. 32, 10 U.S.C. § 832 (1988) [hereinafter UCMJ].

¹²167 N.J. Super. 411, 484 A.2d 1330 (1984).

¹³*Craig*, 110 S. Ct. at 3159, 3166.

¹⁴*Id.* at 3166.

¹⁵*Id.*

¹⁶For an excellent discussion of issues arising from UCMJ article 32 testimony, see Merck, *Sixth Amendment Issues at the Article 32 Investigation*, *The Army Lawyer*, Aug. 1990, at 17.

¹⁷*United States v. Connor*, 27 M.J. 378 (C.M.A. 1989) (witness's former testimony at pretrial hearing admissible when defense counsel had an opportunity to impeach, despite counsel's stated intention to use hearing solely as a means of discovery).

either an expert's opinion or an actual attempt by the child to provide testimony indicates that the child will be unable to testify in front of the accused, a prereferral video tape can be made during a session at which defense counsel has a full opportunity to cross-examine the child. Defense counsel may, as a tactical matter, refuse to cooperate, preferring to raise the sixth amendment violation at trial. The risk of an adverse finding by the court, however, may be a powerful incentive to cooperate—particularly when the alternative is no cross-examination.

Investigative Videotapes

In contrast to the litigative statement, the investigative statement is obtained for use by the government to determine whether a case should be prosecuted. It is intended to be an internal record, rather than a substitute for in-court confrontation. Therefore, regardless of how well intentioned the investigator, an investigative statement cannot provide the functional equivalent of adversarial cross-examination. The issue concerning an investigative videotape is not whether it is admissible in lieu of in-court testimony, but—assuming it were admissible under an exception to the hearsay rule¹⁸—whether it is violative of an accused's right to confrontation under the sixth amendment.¹⁹

If the child is available, he or she must appear in person and testify. The only exception is when the court has found, after a thorough investigation, that the child is effectively unable to testify in the presence of the accused by reason of trauma. When the child is not physically present to be examined, the court cannot engage in the necessary investigation of the child's mental and emotional state, nor can it order the child to testify under special arrangements. The type of analysis required by *Craig* is not possible; therefore, the court must apply the two-part test set forth in *Idaho v. Wright*²⁰ to determine the admissibility of hearsay statements under the sixth amendment.

First, "the prosecution must either produce or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant.... Second, once a witness is shown to be unavailable, 'his statement is admissible only if it bears adequate indicia of reliability.'" ²¹ The "indicia of reliability" requirement may be met in one of two ways: (1) either the hearsay statement must fall within "a firmly rooted hearsay exception"; or (2) the statement must be supported by "particularized guarantees of trustworthiness." The "particularized guarantees of trustworthiness" must be shown from the totality of the circumstances *that surround the making of the statement*—not from other evidence at trial that may corroborate the truth of the statement.²² Therefore, the first step is to determine the witness's availability.

For purposes of Military Rule of Evidence 804, a declarant is unavailable when he or she is absent from trial and the "proponent of the declarant's statement has been unable to procure the declarant's attendance ... by process or other reasonable means."²³ Although "[a] subpoena may not be used to compel a civilian to travel outside the United States and its territories,"²⁴ "non-amenability to a subpoena does not necessarily establish nonavailability as a witness."²⁵

The sixth amendment requires that the government make a "good faith" effort to produce the declarant at trial:

If there is a possibility, albeit remote, that affirmative measures might produce the declarant, the obligation of good faith may demand their effectuation. The lengths to which the prosecution must go to produce a witness ... is a question of reasonableness. The ultimate question is whether the witness is unavailable despite good faith efforts undertaken prior to trial to locate and present that witness. As with other evidentiary proponents, the prosecution bears the burden of establishing this predicate.²⁶

¹⁸An out-of-court statement, offered to prove the truth of the matter asserted therein, is inadmissible unless it falls within one of the hearsay exceptions set forth in Military Rules of Evidence 803 or 804. See Manual for Courts-Martial, United States, 1984 [hereinafter MCM, 1984], Military Rules of Evidence 801, 802 [hereinafter Mil. R. Evid.].

¹⁹"Although [the Sixth Amendment] and the hearsay rule possess similar underpinnings, they are not co-extensive and evidence admissible under a hearsay exception may be excludable under the confrontation clause." *United States v. Quick*, 22 M.J. 722, 724 (A.C.M.R. 1986) (citations omitted).

²⁰110 S. Ct. 3139 (1990).

²¹*Id.* at 3141, 3149.

²²*Id.*

²³*United States v. Crockett*, 21 M.J. 423, 427 (C.M.A. 1986) (citations omitted).

²⁴Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 703(e)(2)(A); see also *Crockett*, 21 M.J. at 427.

²⁵*Crockett*, 21 M.J. at 427; see also *United States v. Ferdinand*, 29 M.J. 164 (C.M.A. 1989) (child witness is not unavailable solely because of state juvenile court order forbidding child to testify at other proceedings).

²⁶*Ohio v. Roberts*, 448 U.S. 56, 74-75 (1980), quoted in *Crockett*, 21 M.J. at 430 (citation omitted).

Once unavailability has been shown, the statement must bear adequate "indicia of reliability" to be admissible.²⁷ Reliability may be shown if the statement falls within a "firmly rooted hearsay exception" or if it bears "particularized guarantees of trustworthiness."²⁸ Moreover, the "particularized guarantees of trustworthiness" must be equivalent to those required by the firmly rooted hearsay exceptions.²⁹ With respect to the established hearsay exceptions, reliability is ensured by the circumstances under which the statements were made.³⁰ Similarly, to satisfy the residual hearsay exception, the totality of the circumstances that surrounded the making of the statement must manifest "particularized guarantees" of trustworthiness.³¹ The key is whether the evidence sought to be admitted "rests upon such solid foundations that admission of virtually any evidence within them comports with the substance of the constitutional protection"³² of the confrontation clause.

The well-established exceptions to the hearsay rule are predicated upon the assumption that the declarant's truthfulness is so clear from the surrounding circumstances that the test of cross-examination would be of marginal utility.³³ The residual hearsay exception is not a well-established exception,³⁴ nor was it intended to encompass all statements made by children.³⁵ When allegations of

abuse have been repeated to several adults prior to involvement by government authorities, the issue of whether or not a child's statement can ever be trustworthy enough to render cross-examination useless is unclear.³⁶ These statements—whether they are videotaped or reduced to writing—are merely the work product of a particular government authority and are no more reliable than any other well-intentioned assertion of fact. As noted by Judge Cox in *United States v. Barror*, "[w]e would not ordinarily expect the 'investigative process' alone to equate to the 'judicial process' for confrontation purposes."³⁷ Hearsay statements by children are no more reliable than similar statements by adults. Rather, they actually may be less reliable in general because of the suggestibility of most children.³⁸

In *Wright* the United States Supreme Court refused to set artificial guidelines for the admissibility of hearsay statements made during professional interviews.³⁹ When faced with an investigative interview, trial courts must continue to examine the factual circumstances of each case for specific guarantees of trustworthiness.⁴⁰ A videotaped interview containing hearsay statements should be treated no differently than a similar written document. A videotape enables the trial judge to determine the child's sincerity, thereby providing a great advantage

²⁷ *Wright*, 110 S. Ct. at 3146-47.

²⁸ *Id.*

²⁹ Mil. R. Evid. 803(24), 804(b)(5); see also *Huff v. White Motor Corp.*, 609 F.2d 286, 293 (7th Cir. 1979).

³⁰ S. Salzberg, L. Schinasi & D. Schlueter, *Military Rules of Evidence Manual* 641 (2d ed. 1986). Even when the requirements of the specific exception are met, the evidence still may be excluded if admission would be a violation of the sixth amendment confrontation rights of an accused. *Id.* at 639-40.

³¹ *Wright*, 110 S. Ct. at 3148-49.

³² *United States v. Hines*, 23 M.J. 125, 129 (C.M.A. 1986) (quoting *Roberts*, 448 U.S. at 56).

³³ *Wright*, 110 S. Ct. at 3149.

³⁴ *Id.* at 3147-48.

³⁵ See *United States v. Bailey*, 581 F.2d 341, 346 (3d Cir. 1978) (legislative history indicates congressional intent that residual hearsay rule have a narrow focus and limited scope); *United States v. White*, 17 M.J. 953, 957 (A.F.C.M.R. 1984).

³⁶ See, e.g., Gelman, *The Sex-Abuse Puzzle*, *Newsweek*, Nov. 13, 1989, at 99; Lacayo, *Sexual Abuse or Abuse of Justice?*, *Time*, May 11, 1987, at 49; Slicker, *Child Sex Abuse: The Innocent Accused*, 91 *Case & Com.* 12 (Nov. — Dec. 1986).

³⁷ 23 M.J. 370, 372 (C.M.A. 1987) (statement by accused's stepson to law enforcement officials not admissible as residual hearsay) (citing *Hines*, 23 M.J. at 137).

³⁸ See *Craig*, 110 S. Ct. at 3175 (Scalia, J., dissenting):

[t]he "special" reasons that exist for suspending one of the usual guarantees of reliability in the case of children's testimony are perhaps matched by "special" reasons for being particularly insistent upon it in the case of children's testimony. Some studies show that children are substantially more vulnerable to suggestion than adults, and often unable to separate recollected fantasy (or suggestion) from reality.

³⁹ *Wright*, 110 S. Ct. at 3148.

⁴⁰ *Hines*, 23 M.J. at 125.

over written hearsay. The apparent sincerity of the child's unchallenged statement, however, is but one matter to be considered. The trial court essentially must find the statement to be so reliable that cross-examination is unnecessary.⁴¹ The vulnerability of children to suggestion—particularly after repeated statements to several adults—warrants the exercise of caution by trial courts.

Practice Tips

Both trial and defense counsel should—

—Be alert to the possibility that a child-witness may be unavailable or unable to testify at trial.

—Anticipate the need for a litigative videotape prior to referral.

—Arrange for the child to be examined by a psychiatrist or clinical psychologist as early as possible and apprise the expert of the nature of the court's inquiry.

—Remember that a litigative videotape is a substitute for live, in-court testimony. It is not admissible as a prosecution exhibit and court-martial members are not entitled to replay the videotape during deliberations.

—Remember that, if a prereferral videotape is made, the child still must appear at a UCMJ article 39(a) hearing for a judicial determination of trauma.

Trial counsel should—

—Coordinate with defense counsel at an early stage of the proceedings to avoid assertions of bad faith or withholding evidence.

—Provide defense counsel with all evidence that would be available at trial to ensure that the litigative videotape is truly confrontational.

—Caution military criminal investigators not to "rehearse" a child prior to making an investigative videotape.

Defense counsel should—

—Make a specific discovery motion well prior to making any videotape that might be interpreted as litigative in nature, to include the filming of a UCMJ article 32 hearing.

—Determine whether a litigative videotape would be more favorable to a client than live, in-court testimony.

Few things are more devastating to the defense than the sight of a frightened, sobbing child on the stand.

—Discuss the procedural and legal aspects of a litigative videotape with the client to protect yourself from assertions of ineffective assistance of counsel.

—Be wary of advising the client to waive his right to face-to-face confrontation absent a judicial determination of trauma. If a litigative videotape is truly in the client's best interests and if the client desires to waive face-to-face confrontation, request that the military judge conduct a detailed inquiry on the record.

—Raise both due process⁴² and confrontation issues when face-to-face confrontation is in the client's best interests and when insufficient evidence exists to demonstrate that the child would be traumatized by giving live, in-court testimony.

—Request the military judge to instruct the court-martial members that, if a substitute for live, in-court testimony is used, it is for the sole purpose of enabling the child to testify more coherently and effectively, and should not be taken as an indication of the client's guilt.

The Advocate for Military Defense Counsel

DAD Notes

Can Someone Have a Reasonable Expectation of Privacy in Government-Owned Property?

A soldier comes into a defense counsel's office and explains that while on temporary duty, his wife called his supervisor and reported that he had been stealing numerous items from the shopping mall where he worked off-duty as a security guard. The soldier's wife also reported that he had been stealing large quantities of military camping equipment, military swords and plaques, and office supplies, as well as large amounts of personal property. Coincidentally, the soldier's duty position is curator of the installation's museum.

The supervisor, acting on these tips, searched the soldier's desk to find the museum inventory books in an effort to account for museum property. Instead of finding inventory sheets, however, the supervisor discovered various items that had been missing around the office, as well as personal items belonging to co-workers. These items have become the subject of several larceny charges

⁴¹ *Wright*, 110 S. Ct. at 3149.

⁴² Because *Coy* was decided on confrontational grounds, the due process argument was noted but not addressed. See *Coy*, 108 S. Ct. at 2799.

now preferred against the soldier.¹ Among other subjects of concern, the soldier wants to know why someone can search "his" desk and "his private" work area without any authorization.

The Army Court of Military Review recently addressed this issue in *United States v. Craig*.² To decide *Craig*, the Army court first looked at the United States Supreme Court's decision in *O'Connor v. Ortega*,³ which held that public employees may have a reasonable expectation of privacy in government-owned property, but that the expectation of privacy must be determined on a case-by-case basis. Dr. Ortega held the position of Chief of Professional Education at Napa State Hospital for seventeen years until he was dismissed in 1981. He had a private office that he had occupied for those seventeen years and did not share his office or his desk with any other person. Additionally, he kept personal correspondence, medical files, and other documents unconnected to the hospital in his desk. Finally, the hospital never set a policy of discouraging Dr. Ortega from storing personal items in his office.⁴

The *Ortega* Court delineated the test to determine whether a public employee has a reasonable expectation of privacy in an office desk. The Court indicated that the facts must be assessed on a "case-by-case basis," in light of whether the office is "so open to fellow employees or the public that no expectation of privacy is reasonable."⁵ The Court specifically rejected the notion "that public employees can never have a reasonable expectation of privacy in their place of work. Individuals do not lose their Fourth Amendment rights merely because they work for the government instead of a private employer."⁶ Additionally, the nature of a workplace could result in a diminishing expectation of privacy in offices, desks, and filing cabinets by virtue of office practices or a legitimate policy or regulation.⁷

The Court indicated that government offices seldom are free of entry by supervisors, other employees, and business invitees. Therefore, an employee's reasonable expectation of privacy must be determined by the facts of each case.⁸ Applying this standard, the Court found that Dr. Ortega did have a reasonable expectation of privacy

in his office and desk. The Supreme Court, having determined that a reasonable expectation of privacy existed, stated that the next consideration is whether the search conducted was reasonable under the fourth amendment. The Court, however, did not rule on that issue.⁹

Applying the *Ortega* standard, the *Craig* court found that in the military the scope of an expectation of privacy depends, in part, on the demands of the workplace and its openness to employees and the public.¹⁰ The court found that the military judge made several pertinent findings of fact with respect to this issue, such as: (1) the accused's desk was incapable of being locked; (2) up until two weeks prior to the search of the desk, the accused had shared the office with other personnel; (3) eight other individuals had a key to the office; (4) the accused had been ordered by his prior supervisor not to lock his desk and to remove all personal items from the desk; (5) a captain used the desk many times, entered it looking for papers and files, and had ordered the accused to keep it unlocked; and, (6) the office was subject at any time to a security inspection.¹¹ Based on these facts, the Army court found that the accused did not have a reasonable expectation of privacy in his government-owned desk.

To defense counsel, the *Craig* case apparently makes a service member's asserting that he or she has a reasonable expectation of privacy in government-owned property nearly impossible. A soldier never will remain in a place long enough to have a desk for seventeen years, as did Dr. Ortega. Counsel, however, should note that the specific amount of time needed to acquire a reasonable expectation of privacy was not established by these opinions. Rather, time merely is one of the various factors that must be considered. Because each circumstance must be examined on a case-by-case basis, other factors concerning a particular client's situation may minimize the importance of this time element.

Another important factor is the identity of the person conducting the search. In *United States v. Muniz*,¹² for example, the Court of Military Appeals determined that the accused did not have a reasonable expectation of privacy in his military desk vis-a-vis his commander. The court found that the "omnipresent fact" that his desk

¹ See Uniform Code of Military Justice art. 121, 10 U.S.C. § 921 (1982) [hereinafter UCMJ].

² CM 9000832, slip op. (A.C.M.R. 30 Jan. 1991).

³ 480 U.S. 709 (1987).

⁴ *Id.* at 718-19.

⁵ *Id.* at 718.

⁶ *Id.* at 717.

⁷ *Id.* In its opinion, the Army court suggested the publication of Department of the Army or command regulations to discourage the storage of personal effects in soldiers' desks would help to resolve this issue in the future. See *Craig*, slip. op. at 2 n.3.

⁸ *Ortega*, 480 U.S. at 718.

⁹ *Id.* at 719, 726-27.

¹⁰ *Craig*, slip op. at 2; see *United States v. Battles*, 25 M.J. 58, 60 (C.M.A. 1987).

¹¹ *Craig*, slip op. at 3.

¹² 23 M.J. 201 (C.M.A. 1987).

could be inspected at a moment's notice, coupled with government ownership and the "ordinarily nonpersonal nature of military offices," meant that only minimal expectations of privacy with respect to a search by a commander were possible.¹³ The court, however, did recognize that, against intrusions by "the rest of the world," the expectation of privacy becomes unquestionably greater.¹⁴ Therefore, although satisfying the *Ortega* test may be difficult with a military accused, in the right factual setting it still is a possible argument to use when trying to suppress the results of a search. Captain Michael W. Meier.

Any Criminal Proceeding Will Do for Obstruction of Justice

In its recent decision in *United States v. Smith*,¹⁵ the Army Court of Military Review expanded the proscription of obstruction of justice to include civilian criminal proceedings. In *Smith* the accused was pending charges in a Tennessee state court for sexually abusing his two daughters. Prior to the preliminary hearing, the accused discovered that one of the victims, seventeen-year-old Tracy, was dating and planning to marry a soldier, Private B. Enlisting the assistance of Private B's chain-of-command, the accused successfully terminated the marriage plans and the relationship between Tracy and Private B. The accused then contacted Private B and told him that he would consent to the marriage if Private B would convince Tracy to change her testimony at the accused's preliminary hearing in the Tennessee court. This action resulted in the accused being tried at a general court-martial for obstruction of justice, in addition to the original charges of sodomy, attempted sodomy, indecent liberties, and rape.

The Army court, in affirming the findings of guilty, noted that the proscription of obstruction of justice historically applied only to military proceedings.¹⁶ The court cited language from the Court of Military Appeals' decision in *United States v. Guerrero*¹⁷ that "case law clearly indicates the overriding concern of this provision of military law is the protection of 'the administration of justice in the military system.'"¹⁸ The Army court acknowl-

edged that the purpose of the military obstruction of justice offense is not the protection of individuals, victims, or witnesses, but rather the military justice system itself. It nevertheless reasoned that the Court of Military Appeals in *Guerrero* did not intend to preclude the prosecution of a soldier's obstruction of a state proceeding.¹⁹ The Army court examined the elements of the offense and found "no limitation in these elements that [indicates that] ... obstruction of justice pertains solely to military justice."²⁰ The court, citing *Solorio v. United States*,²¹ reasoned that "[w]henver a person subject to the Code acts to obstruct justice in a state criminal proceeding he should know that a military criminal investigation or proceeding could result."²² Ultimately, the Army court relied upon the military's interest in preserving the "image that its servicemembers have integrity."²³ The court seemed to rest its decision on one of the basic, underlying purposes behind article 134—that is, to prevent conduct by military personnel that in any way brings discredit on the armed services.

The Army court's decision in *Smith*, however, is not consistent with existing law. It ignores the plain language of *Long* and *Guerrero*, as well as their progenies. Additionally, the decision appears to ignore the Army court's own precedent. The Army court, in *United States v. Gray*,²⁴ held that "there must be some allegation that an official authority has manifested an official act, inquiry, investigation, or other criminal proceeding with a view to possible disposition *within the administration of justice of the armed forces*."²⁵

Defense counsel in the field must take note of *Smith* because it may open the door to additional charges against their clients. In light of the obviously conflicting opinions, however, defense counsel should continue to challenge these specifications. Captain Lauren B. Leeker.

Contract Appeals Division Note

The Protest of Symbiont, Inc.

On January 18, 1991, the General Services Board of Contract Appeals (GSBCA or Board) dismissed the pro-

¹³*Id.* at 206.

¹⁴*Id.*

¹⁵CM 9000327, slip op. (A.C.M.R. 15 Jan. 1991).

¹⁶*Smith*, slip op. at 3 (citing *United States v. Long*, 6 C.M.R. 60 (C.M.A. 1952); *United States v. Delaney*, 44 C.M.R. 367 (A.C.M.R. 1971); *United States v. Daminger*, 31 C.M.R. 521 (A.F.B.R. 1961)).

¹⁷28 M.J. 223 (C.M.A. 1989).

¹⁸*Id.* at 227 (citing *Long*, 6 C.M.R. at 65).

¹⁹*Smith*, slip op. at 3.

²⁰*Id.* at 3-4.

²¹483 U.S. 435, *reh'g denied*, 438 U.S. 1056 (1987).

²²*Smith*, slip op. at 4.

²³*Id.*

²⁴28 M.J. 858 (A.C.M.R. 1989).

²⁵*Id.* at 861 (emphasis added).

test of Symbiont, Inc., (Symbiont) because it was filed untimely.²⁶ The decision, counting Christmas Eve as a workday for the purposes of the Board's timeliness rules,²⁷ represents the latest instance in which the Board has applied strictly its time limitations for filing protests against automated data processing equipment (ADPE) acquisition programs.²⁸

Symbiont had submitted a proposal in response to a solicitation for computerized combat training support services, but was eliminated from the competitive range after technical evaluations were completed. The contracting officer sent Symbiont written notification of its elimination from the competitive range, and the reasons therefor, by facsimile on Friday, December 14, 1990. Symbiont received the letter by facsimile at approximately 4:00 p.m. on the same day. Symbiont filed its protest on January 2, 1991, at 11:29 a.m., challenging the appropriateness of its elimination from the competition.²⁹

On January 4, 1991, the Army moved to dismiss the protest because it was filed untimely.³⁰ The Army argued that Symbiont had actual knowledge of the alleged grounds for its protest on December 14, 1990—the date it received the letter by the contracting officer informing it that it was eliminated from the competitive range.³¹ Thereafter, under the GSBCE Rules of Procedure, Symbiont had ten days—excluding Saturdays, Sundays, and federal holidays—to file its protest.³² By the Army's calculation, the protest was filed on the eleventh "working" day following the date Symbiont learned of the alleged basis of its protest. Therefore, according to the Army, it was one day late.

Symbiont opposed the Army's motion, contending that by issuing Executive Order 12739,³³ President Bush declared December 24, 1990, a "federal holiday" for purposes of applying the timing rule. Symbiont argued that by allowing all federal employees a half day off,³⁴ and by referencing the federal holiday statutes and executive orders,³⁵ the executive order effectively declared December 24, 1990, as a federal holiday, albeit a half-day holiday. Accordingly, Symbiont argued that the time period for filing its protest was extended until noon on January 2, 1991.³⁶

Adopting the Army's rationale, the Board interpreted the language of the executive order narrowly, holding that it simply closed the government "... for the last half of the scheduled workday, without expressly declaring this period to be a 'holiday' within the meaning of 5 U.S.C. § 6103,"³⁷ and that the provision of the order making holiday pay and leave statutes applicable would have been superfluous had the order intended to declare December 24, 1990, a federal holiday.³⁸ Symbiont's alleged reliance upon a contrary interpretation was considered "ill-judged" by the Board, "[g]iven the untested nature of this proposition, and the Board's consistently strict application of its timeliness rules."³⁹

The Board expressly declined to consider the effect of a declaration of a federal holiday of less than a full day.⁴⁰ Given the terms of the rule⁴¹, however, the Board probably would interpret the intervening half-day holiday to be a completely excluded day for purposes of filing, rather than simply extending the time for filing by the same amount of "holiday" time.⁴² Major Charles R. Marvin, Jr.

²⁶ Symbiont, Inc., GSBCE No. 11037-P, 1991 WL 6504 (Jan. 18, 1991).

²⁷ See 48 C.F.R. § 6101.5(b)(3) (1990).

²⁸ See React Corp., GSBCE No. 9456-P, 1988 BPD ¶ 111 (although nonjurisdictional, the rules establishing time limits for filing protests strictly are enforced by the Board); see also International Technology Corp., GSBCE No. 10369-P, 1989 BPD ¶ 374, at 12 n.4 (strict enforcement of the timeliness rules promotes "the [statutory] goals of economic and efficient procurement" (citing 40 U.S.C. § 759(f)(8) (Supp. V 1987)). Strict enforcement of the timeliness rules also allows both government personnel and prospective contractors to determine with certainty when protests may be brought. See Leica, Inc., GSBCE No. 10816-P, 1990 BPD ¶ 286. The Board has dismissed protests determined to have been filed from slightly over an hour late, see Computer Dynamics, Inc., GSBCE No. 10288-P, 1989 BPD ¶ 294, to merely one minute late. Morton Management, Inc., GSBCE No. 9828-P, 1989 BPD ¶ 44 (subsequent motion for reconsideration of timeliness was granted only because of additional evidence that the protest actually was filed 17 minutes before the deadline). The Board expressly declined to reconsider the strict application of the specific timeliness rule. See Morton Management, Inc., GSBCE No. 9828-P-R, 1990 BPD ¶ 15.

²⁹ Symbiont, 1991 WL 6504, at 2.

³⁰ See 48 C.F.R. § 6101.5(b)(3)(ii) (1990).

³¹ See D&R Office Mach. Sales and Serv., Inc., GSBCE No. 10311-P, 1989 BPD ¶ 320; KSK Enter., Inc., GSBCE No. 10269-P, 1989 BPD ¶ 295.

³² 48 C.F.R. § 6101.5(b)(3) (1990).

³³ 55 Fed. Reg. 52,165 (Dec. 19, 1990).

³⁴ *Id.*

³⁵ *Id.*

³⁶ Symbiont's second argument for extension was that because of the time of its receipt of the facsimile—4:30 p.m.—it should not be deemed to have received notice of the contracting officer's decision eliminating it from the competitive range until the next business day—Monday, December 17, 1990. The argument apparently was abandoned by Symbiont in its response to the Army's opposition, and it subsequently was ignored by the Board.

³⁷ Symbiont, 1991 WL 6504, at 4.

³⁸ *Id.* at 5.

³⁹ *Id.*

⁴⁰ *Id.* at 7 n.2.

⁴¹ See 48 C.F.R. § 6101.5(b)(3) (1990): "In determining the time for filing protests under subparagraphs (b)(3)(ii) and (iii) of this subparagraph, intervening Saturdays, Sundays, and federal holidays shall not be counted."

⁴² Given the stated rationales for strict enforcement of the timeliness rules, see *supra* note 69, certainty of determination virtually compels the interpretation that if any part of the day is a federal holiday, the entire day is not counted. This interpretation would be consistent with the Board's treatment of situations in which the Office of the Clerk is inaccessible for part of the final day for filing. See generally Severn Cos., GSBCE No. 9344-P, 1988 BPD ¶ 14.

TJAGSA Practice Notes

Instructors, The Judge Advocate General's School

Criminal Law Notes

Alleging Adultery

The accused in *United States v. King*¹ was tried, *inter alia*, for adultery.² At trial, the defense moved for a finding of not guilty³ to the adultery specification because the government failed to allege that either the accused or his sexual partner were married to someone else.⁴ The military judge denied the motion, finding that the specification was "barely sufficient enough to get by."⁵ The accused thereafter defended against the adultery charge by denying the offense and presenting the defense of alibi. The accused ultimately was convicted of adultery by the members.

The Army Court of Military Review in *King* affirmed the accused's adultery conviction.⁶ The court acknowledged, however, that its opinion in *United States v. Clifton*,⁷ decided about ten years earlier, suggested a different result. In *Clifton* the Army court set aside the accused's conviction for adultery because the adultery specification failed to allege that either the accused or his partner was married to a third person.⁸ The *Clifton* court concluded that the phrase "a woman not his wife," which was alleged in the challenged specification, did not, "standing alone, impl[y] anything regarding the marital status of either party to the intercourse."⁹

The court in *King* cited several intervening cases¹⁰ for the proposition that *Clifton* no longer is controlling and

that, over the last decade, the adequacy of imperfect specifications has been viewed with greater tolerance by the military's appellate courts.¹¹ Relying on these cases, the court in *King* concluded that

in the words "wrongfully have sexual intercourse" in addition to the words "a woman not his wife" [is] an implication that one of the parties had to be married. Even though appellant objected to the specification after the government rested, he was on notice of the offense. He continued to defend against the offense of adultery. There is no doubt that the record will protect appellant from further prosecution for this offense. Consequently, we find no prejudice to the appellant arising from the inartfully drafted specification.¹²

Several aspects of the court's decision in *King* are troubling. First, the accused pleaded not guilty and challenged the adequacy of the specification at trial. Therefore, the adequacy of the specification should be viewed less "liberally" by the appellate court than otherwise would be the case.¹³ *King* expressly does not apply this stricter standard.

Secondly, the specification at issue in *King* was framed under the general article of the Uniform Code of Military Justice (UCMJ)—that is, article 134. The specific crime involved—adultery—was not alleged explicitly on the charge sheet.¹⁴ Accordingly, the allegation of the particular UCMJ article violated did not notify the defense

¹CM 9000332 (A.C.M.R. 25 Jan. 1991).

²See Uniform Code of Military Justice art. 134, 10 U.S.C. § 934 (1982) [hereinafter UCMJ].

³See generally Manual for Courts-Martial, United States, 1984 [hereinafter MCM, 1984], Rule for Courts-Martial 917 [hereinafter R.C.M.].

⁴The adultery specification was drafted as follows:

In that Staff Sergeant Willie L. King, U.S. Army, V Company, 262 Quartermaster Battalion, 23d Quartermaster Brigade, Fort Lee, Virginia, did at Chester, Virginia, on or about 3 September 1989, wrongfully have sexual intercourse with Private First Class [full name alleged], a woman not his wife.

King, slip op. at 1-2 n.1. The *King* court wrote that the precise basis for the defense motion was that the specification "failed to allege that appellant was a married man." *Id.*, slip op. at 1. Adultery occurs if either the accused or the other person is married to someone else, provided that the other elements of the offense are satisfied. See MCM, 1984, Part IV, para. 62b; *United States v. Melville*, 25 C.M.R. 101 (C.M.A. 1958); *United States v. Butler*, 5 C.M.R. 213 (A.B.R. 1952). In light of the appellate court's characterization of the motion in *King*, the accused probably was married but his partner was not.

⁵*King*, slip op. at 2.

⁶*Id.*, slip op. at 3.

⁷11 M.J. 842 (A.C.M.R. 1981), *rev'd on other grounds*, 15 M.J. 26 (C.M.A. 1983).

⁸*Clifton*, 11 M.J. at 842-43.

⁹*Id.* at 843 (emphasis in original). The court observed further that "[i]t is as likely from the pleading that either one or both were single as it is that one was married." *Id.*

¹⁰See *id.* (citing *United States v. Bryant*, 30 M.J. 72 (C.M.A. 1990); *United States v. Brecheen*, 27 M.J. 67 (C.M.A. 1988); *United States v. Watkins*, 21 M.J. 208 (C.M.A. 1986); *United States v. Berner*, CM 8902410 (A.C.M.R. 17 Jan. 1991)).

¹¹For a general discussion of this development and some of the cases cited in *King*, see TJAGSA Practice Note, *Pleading Carnal Knowledge*, The Army Lawyer, Apr. 1991, at 39.

¹²*King*, slip op. at 3.

¹³*Bryant*, 30 M.J. at 73; see *Brecheen*, 27 M.J. at 68; *Watkins*, 21 M.J. at 209.

¹⁴The allegation of the UCMJ article number, without specifying the offense by name, comports with the pleading requirements set forth in the Manual for Courts-Martial. See MCM, 1984, R.C.M. 307(c), app. 4.

expressly which article 134 offense was being charged.¹⁵ Moreover, because only a single specification relating to sexual misconduct was alleged under article 134,¹⁶ its adequacy could not be "bootstrapped" by referring to other, properly drafted specifications under the same charge.¹⁷

The challenged specification, which was alleged under article 134, is especially significant because of the number of closely related article 134 offenses that reasonably might have been at issue. For example, indecent acts with another¹⁸ can occur if the accused engages in consensual sexual intercourse "with a woman not his wife"¹⁹ in the presence of others.²⁰ Wrongful cohabitation is another article 134 offense²¹ that typically is alleged in terms that are roughly similar to the terms used to specify adultery.²² A general disorder or neglect under article 134 likewise could be alleged in language that resembles the language used in the challenged specification.²³ For all of these possible article 134 offenses, the allegation that wrongful sexual intercourse occurred between the accused and a "woman not his wife" simply could state a matter in aggravation.²⁴ Accordingly, even if the challenged specification fairly could be construed to allege some type of sexual conduct that is prejudicial to good order and discipline or service discrediting, it does not necessarily follow that adultery, in particular, was alleged. *King* does not recognize or address these difficulties expressly.²⁵

Third, even assuming that adultery was alleged adequately, the specification at issue in *King* did not suggest which of the parties—the accused, the other person, or both—were married to someone else. Therefore, the trial judge, at a minimum, could have treated the defense motion to dismiss as motion for a bill of particulars²⁶ and required the government to specify which of the parties were allegedly married.²⁷ *King* does not suggest that the military judge should have used, or even should have considered, this response to the defense motion.

Finally, the *King* court seemed to rest its conclusion that the specification provided adequate notice of adultery on the fact that the accused ultimately defended against that crime. This could have a chilling effect upon defense counsel at courts-martial. Assume that the defense pleads not guilty and makes a motion to dismiss an imperfect specification after jeopardy attaches,²⁸ as was done in *King*. If the military judge denies the motion, *King* suggests that a subsequent, affirmative attempt by the defense to contest the accused's guilt at trial could prejudice the defense motion to dismiss on appeal. *King* fails to consider the propriety and wisdom of a precedent that risks these consequences.

King nevertheless is only the latest case to relax the formal requirements for pleading under military practice. Regardless of the correctness or wisdom of this decision, counsel must be aware of *King*'s specific impact on pleading adultery and the broader trend that it reflects. Major Milhizer.

¹⁵ See generally *United States v. Simpson*, 25 M.J. 865, 866 n.1 (A.C.M.R. 1988) (drug distribution specification that omitted "wrongful" was not fatally deficient, in part, because the article of the UCMJ under which it was charged helped put the accused on notice of what he had to defend against).

¹⁶ The accused also was charged with obstruction of justice, which also is a violation of article 134.

¹⁷ In other words, if the accused had been charged with multiple adultery specifications and only one omitted an otherwise essential allegation, the other specifications indirectly might put the accused on notice of what he must defend against. See *Watkins*, 21 M.J. at 210; *Simpson*, 25 M.J. at 866.

¹⁸ See MCM, 1984, Part IV, para. 90.

¹⁹ Indecent acts with another also could have occurred if the acts are performed with his wife. See *id.*

²⁰ *United States v. Hickson*, 22 M.J. 146 (C.M.A. 1986); *United States v. Berry*, 20 C.M.R. 325 (C.M.A. 1956); *United States v. Carr*, 28 M.J. 661 (N.M.C.M.R. 1989); *United States v. Brundidge*, 17 M.J. 586 (A.C.M.R. 1983).

²¹ MCM, 1984, Part IV, para. 69.

²² See generally *United States v. Acosta*, 41 C.M.R. 341 (C.M.A. 1970); MCM, 1984, Part IV, para. 69f.

²³ See generally *United States v. Williams*, 24 C.M.R. 135 (C.M.A. 1957); *United States v. Regan*, 11 M.J. 745 (A.C.M.R. 1971); MCM, 1984, Part IV, paras. 60c(6)(a), 60c(6)(c); TJAGSA Practice Note, *Mixing Theories Under the General Article*, *The Army Lawyer*, May 1990, at 66. Because of the disparity in rank between the accused and his partner, and their apparent cadre-trainee relationship, a general disorder or neglect conceivably could have been alleged.

²⁴ See generally Milhizer, *Mistake of Fact and Carnal Knowledge*, *The Army Lawyer*, Oct. 1990, at 3, 9-10 (intercourse outside of the marital union traditionally had been viewed as being wrongful even if not illegal).

²⁵ The possible ambiguity in alleging article 134 offenses is exacerbated by the availability of form specifications in Part IV of the Manual for Courts-Martial. One reasonably could assume that had the government intended to allege adultery, it would have simply followed the form specification for that offense found at MCM, 1984, Part IV, para. 60f, which states, in part, "... wrongfully have sexual intercourse with _____, a (married) (woman/man) not (his wife) (her husband)." A different allegation could suggest that a different offense was contemplated.

²⁶ See MCM, 1984, R.C.M. 906(b)(6).

²⁷ See generally *United States v. Mobley*, 31 M.J. 273, 278 (C.M.A. 1990).

²⁸ See generally UCMJ art. 44.

Defining "Breaking" for Burglary

The accused in *United States v. Thompson*²⁹ was convicted, *inter alia*, of two specifications of burglary.³⁰ In the initial instance, the accused went to a first floor window of a building where he removed a screen, raised a venetian blind, and entered the barracks room of another soldier through the now unobstructed window.³¹ The accused later went to a first floor window of another barracks room that had no screen. As he "leaned over into the room, he pushed aside "a fully extended venetian blind."³² He then entered through the window.³³

This latter incident was the subject of the Court of Military Appeal's opinion in *Thompson*. Specifically, the court addressed whether the accused's act of pushing aside a venetian blind to gain entry through an otherwise open window constituted a breaking within the meaning of article 129.³⁴ In resolving this issue, the court defined "breaking" in more expansive terms than had been done in previous military cases.

To be guilty of burglary under military law, an accused unlawfully must break and enter the dwelling house of another during the nighttime with the intent to commit certain offenses proscribed by the UCMJ.³⁵ The element of "breaking" must be pleaded and proved beyond a reasonable doubt.³⁶

The important issue to resolve, however, is what constitutes a breaking. The defense in *Thompson* urged the Court of Military Appeals to adopt a "view of the concept of breaking [that] look[ed] at the intent of the victim in providing security for his dwelling."³⁷ Consistent with this definition of breaking, the defense argued that a venetian blind is not the type of obstruction that is intended to act as security against an intrusion.³⁸ Therefore, the accused's act of moving the blind aside should not have constituted a breaking.

The defense's position in *Thompson* enjoyed some support. Colonel Winthrop discussed the breaking requirement for burglary as follows: "Burglary being the violation of the security of the habitation, the breaking must be of some portion or fixture of the building *relied upon* for the protection of the dwelling ..."³⁹ Earlier military cases—such as *United States v. Handzlik*⁴⁰ and *United States v. Hart*⁴¹—likewise focused upon the intended purpose of the breached obstruction in determining whether a "breaking" had occurred.

The court in *Thompson*, however, applied a definition of breaking that did not turn upon the intended purpose of the obstruction that was breached. The court held that a breaking occurs whenever the perpetrator "'moves any obstruction to entry,' if that 'obstruction' has some physical attributes which can be reasonably understood as

²⁹ 32 M.J. 65 (C.M.A. 1991), *affirming*, 29 M.J. 609 (A.C.M.R. 1989). For a discussion of the Army Court of Military Review's opinion in *Thompson*, see TJAGSA Practice Note, *Burglary and the Requirement for a Breaking*, The Army Lawyer, Jan. 1990, at 32.

³⁰ UCMJ art. 129.

³¹ *Thompson*, 29 M.J. at 610. The facts surrounding the first burglary are not discussed in the Court of Military Appeal's opinion.

³² *Id.* at 65.

³³ *Id.*

³⁴ *Id.* at 65-66.

³⁵ UCMJ art. 129. The elements of burglary are as follows:

- (1) That the accused unlawfully broke and entered the dwelling house of another;
- (2) That the breaking and entering was done in the nighttime; and
- (3) That the breaking and entering was done with the intent to commit an offense punishable under Articles 118 through 128, except Article 123a.

MCM, 1984, Part IV, para. 55b.

³⁶ *United States v. Knight*, 15 M.J. 202 (C.M.A. 1983) ("burglariously" enter" does not allege, by fair implication, the element of breaking required for burglary); see *United States v. Green*, 7 M.J. 966 (A.C.M.R.), *pet. denied*, 8 M.J. 176 (C.M.A. 1979).

³⁷ *Thompson*, 32 M.J. at 67.

³⁸ See *Cook v. State*, 63 Ga.App. 358, 11 S.E.2d 217 (1940) (pushing aside a curtain held not to be a breaking), *cited in Thompson*, 32 M.J. at 67.

³⁹ W. Winthrop, *Military Law and Precedents* 682 (2d ed. 1920 Reprint) (emphasis added).

⁴⁰ 32 C.M.R. 573 (A.B.R. 1962), *pet. denied*, 32 C.M.R. 472 (C.M.A. 1963). In *Handzlik* the accused entered an apartment house and attempted to open the inner door of one of the residences. The resident, believing that one of her fellow tenants was seeking entry, opened the door. Upon seeing the accused, she attempted to close the door, but the accused forced it open against her pressure and entered the room. *Id.* at 574. The board in *Handzlik* distinguished the facts of that case from the situation in which someone gains access to a room by entering through a door left carelessly open. The board found that although entering through a door carelessly left open would not constitute a breaking, the accused's act of forcefully overcoming pressure being used to try to close an open door constituted an actual breaking. *Id.* at 575. The court wrote in this regard that "the act of closing the door *had for its purpose* the protection of the room. The forceful pressure against the door by the accused overcame the corresponding pressure on the door *which was relied upon* for the protection of the room." *Id.* (emphasis added).

⁴¹ 49 C.M.R. 693 (A.C.M.R. 1975). In *Hart* the accused pleaded guilty to the burglary of a fellow soldier's barracks room. During the providence inquiry, the accused said that he pushed open a door to the room that had been left ajar about a quarter of an inch. *Id.* at 694. The court concluded that "the accused's act consisted of pushing rather than opening, unlatching, or in any other manner breaking the closure of the room. Absent a breaking, a conviction for burglary cannot be sustained." *Id.* at 695. The court in *Hart* focused on the intended purpose of the obstruction in determining whether a breaking had occurred, writing, "There must be a breaking, removing, or putting aside of something material constituting a part of the dwelling house and *relied on as a security* against intrusion." *Id.* at 694 (emphasis added).

providing some security for the dweller and a barrier to the burglar's free entry."⁴² This definition of breaking—which does not focus upon the victim's reliance upon or intent that an obstruction provide security—is clearly broader than the definition urged by the defense and suggested by earlier military cases.

The court in *Thompson* explained that this broader definition of breaking is premised upon the congressional intent underlying article 129.⁴³ Specifically, the court instructed that the military offense of burglary, as proscribed by article 129, was intended by Congress to incorporate the common-law formulation of that crime at the time of the UCMJ's enactment in 1950.⁴⁴ The court wrote that 1984 Manual for Courts-Martial's explanation of the breaking requirement for burglary accurately reflects the common-law meaning of that term.⁴⁵ The Manual provides, in pertinent part, that

Merely to enter through a hole left in the wall or roof or through an open window or door will not constitute a breaking; but if a person *moves any obstruction to entry* of the house without which movement the person could not have entered, the person has committed a "breaking." Opening a closed door or window or other similar fixture, opening wider a door or window already partly open but insufficient for the entry, or cutting out the glass of a window or the netting of a screen is a sufficient breaking.⁴⁶

In applying this broad definition of breaking to the facts in *Thompson*, the court first noted that the accused

"pleaded guilty without contesting the physical attributes of the venetian blind."⁴⁷ Although a plea of guilty does not obviate the requirement that the accused's admitted conduct satisfy the elements of proof for the charged offense,⁴⁸ the Court of Military Appeals has become increasingly reluctant to disturb a conviction based upon a facially provident guilty plea.⁴⁹ Accordingly, the court in *Thompson* explained that "the Government is entitled to the inference that the venetian blind did obstruct [the accused's] entry and did provide some physical security to the room."⁵⁰ The court observed further that the venetian blind "provided as much security as would an unlocked door. Logically, if the blind did not obstruct his entry, he would not have had to 'shove' it aside to enter the room."⁵¹ The accused's conviction for burglary, therefore, was affirmed.

Thompson is significant for at least three reasons. First, it clearly establishes that article 129 employs the broad, common-law definition of breaking for burglary. Second, it provides guidance regarding the interpretation of punitive articles generally, emphasizing the preeminent importance of congressional intent. Third, and finally, it reflects the Court of Military Appeals' increasing reluctance to look beyond a facially provident guilty plea. Major Milhizer.

Aiding and Abetting

Two recent Court of Military Appeals cases—*United States v. Pritchett*⁵² and *United States v. Westmoreland*⁵³—discuss various aspects of the mili-

⁴²*Thompson*, 32 M.J. at 67 (citation omitted).

⁴³*Id.*

⁴⁴*Knight*, 15 M.J. at 205; *United States v. Klutz*, 25 C.M.R. 282, 284 (C.M.A. 1958); Uniform Code of Military Justice, Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services, 81st Cong., 1st Sess. 1234 (1949). See generally 4 W. Blackstone, Commentaries on the Laws of England 224 (1769); 2 W. LaFave & A. Scott, Substantive Criminal Law 464 n.1 (1986) (citing authorities). Chief Judge Sullivan, in his concurring opinion in *Thompson*, explicitly held that Congress intended to incorporate the common law of burglary in article 129. *Thompson*, 32 M.J. at 67-68 (Sullivan, C.J., concurring). The other judges in *Thompson*, although less explicit in this regard, agree that article 129 is consistent with common-law burglary. *Id.* at 67.

⁴⁵*Thompson*, 32 M.J. at 67.

⁴⁶MCM, 1984, Part IV, para. 55c(2) (emphasis added). As noted by the court in *Thompson*, many modern American criminal codes have done away with the breaking requirement for burglary, *Thompson*, 32 M.J. at 67 n.3 (citing authorities); 2 LaFave & Scott, *supra* note 13, at 466 (citing authorities). Other criminal codes have modified the offense to be inconsistent with its common-law scope. See generally R. Perkins & R. Boyce, Criminal Law 246-73 (1982). Under many of these statutes, a fact-specific inquiry regarding the nature or purpose of the breached obstruction is unnecessary.

⁴⁷*Thompson*, 32 M.J. at 67. This is significant, because at common law, the specific attributes of the obstruction at issue were important in determining whether a breaking occurred. *Id.* at 68 (Sullivan, C.J., concurring) (citing 2 J. Bishop, A Treatise on Criminal Law § 91.2, at 70 (9th ed. 1923)).

⁴⁸See generally *United States v. Care*, 40 C.M.R. 247 (C.M.A. 1969); *United States v. Johnson*, 25 M.J. 553 (A.C.M.R. 1987).

⁴⁹See *United States v. Harrison*, 26 M.J. 474, 476 (C.M.A. 1988).

⁵⁰*Thompson*, 32 M.J. at 67. In his concurring opinion, Chief Judge Sullivan explained that "since [the accused] pleaded guilty in this case, he cannot now complain of an undeveloped factual record on this question." *Id.* at 68 (Sullivan, C.J., concurring).

⁵¹*Id.* at 67.

⁵²31 M.J. 213 (C.M.A. 1990).

⁵³31 M.J. 160 (C.M.A. 1990).

tary's law of principals.⁵⁴ These cases provide useful guidance regarding the type of conduct that can constitute aiding and abetting⁵⁵ and the requirements for alleging criminal responsibility under an aiding and abetting theory.

The Manual explains that an accused can be criminally liable as a principal—even if he or she did not perpetrate the crime—if his or her conduct satisfies the following two requirements:

(1) He or she must "[a]ssist, encourage, advise, instigate, counsel, command, or procure another to commit, or assist, encourage, advise, counsel, or command another in the commission of the offense;" and

(2) He or she must "[s]hare in the [perpetrator's] criminal purpose of design."⁵⁶

Service members found guilty as a principal under these circumstances typically are referred to as "aiders and abettors."⁵⁷

In *Pritchett*⁵⁸ the accused was convicted of several drug offenses, based in whole or in part upon an aiding and abetting theory.⁵⁹ All of the offenses—distribution of marijuana and possession of marijuana in the hashish form with intent to distribute⁶⁰—occurred at the accused's apartment.⁶¹ In every instance the accused's

wife physically possessed the marijuana and, with respect to the distribution offenses, transferred possession of it to the buyer. The accused was present on each occasion. Physically, however, he neither possessed the marijuana nor transferred possession of the drug.

The court in *Pritchett* looked at several factors to establish that the accused's conduct amounted to aiding and abetting the commission of the charged offenses. Among the factors that supported some or all of the charged offenses were:

(1) the accused knowingly permitted his apartment to be used as "a repository for the illegal drugs possessed by another"⁶²—or, as the court characterized it, a "drug-sale safe house"⁶³—and permitted drugs to be sold "in a common area of his own home;"⁶⁴

(2) the accused answered the door, let the buyer inside, and immediately went to get his wife, knowing that his wife and the buyer were involved in prior drug transactions;⁶⁵

(3) the accused engaged in preliminary "drug talk" with the buyer;⁶⁶

(4) the accused was "immediate[ly]" present when the drugs were sold;⁶⁷

⁵⁴UCMJ art. 77 sets forth the military's law of principals as follows:

Any person subject to this chapter who—

- (1) commits an offense punishable by this chapter, or aids, abets, counsels, commands, or procures its commission; or
- (2) causes an act to be done which if directly performed by him would be punishable by this chapter; is a principal.

⁵⁵See MCM, 1984, Part IV, para. 1b(2)(b).

⁵⁶*Id.* The Manual explains further that "[i]t is possible for a party to have a state of mind more or less culpable than the perpetrator of the offense. In such a case, the party may be guilty of a more or less serious offense than that committed by the perpetrator." *Id.*, Part IV, para. 1b(4); e.g. *United States v. Patterson*, 21 C.M.R. 135 (C.M.A. 1956); *United States v. Jackson*, 19 C.M.R. 319 (C.M.A. 1955); *United States v. Fullen*, 1 M.J. 853 (A.F.C.M.R. 1976).

⁵⁷See MCM, 1984, Part IV, para. 1b. One who satisfies these requirements, but is not present at the scene of the crime, is referred to as "an accessory before the fact." *Id.*

⁵⁸31 M.J. 213 (C.M.A. 1990).

⁵⁹The Court of Military Appeals concluded that the accused also was guilty as a perpetrator of at least some of the offenses. *Id.* at 218-19.

⁶⁰See UCMJ art. 112a.

⁶¹*Pritchett*, 31 M.J. at 214.

⁶²*Id.* at 218 (citing *United States v. Keck*, 773 F.2d 759 (7th Cir. 1985)). See generally *United States v. Traveler*, 20 M.J. 35 (C.M.A. 1985); *United States v. Wilson*, 7 M.J. 290, 293-94 (C.M.A. 1979).

⁶³*Pritchett*, 31 M.J. at 219 (citing Annotation, *Permitting Unlawful Use of Narcotics in Private Home As Criminal Offense*, 54 A.L.R.3d 1297 (1973)).

⁶⁴*Id.* at 219 (citing *United States v. Richardson*, 764 F.2d 1514, 1525 (11th Cir. 1985); *United States v. Harris*, 713 F.2d 623, 626 (11th Cir. 1983)).

⁶⁵*Id.* at 219 (citing *United States v. Medina*, 887 F.2d 528, 532 (5th Cir. 1989); *United States v. Juarez*, 566 F.2d 511, 516 (5th Cir. 1978)).

⁶⁶*Id.* (citing *Keck*, 773 F.2d 759 (7th Cir. 1985); *United States v. Farid*, 733 F.2d 1318, 1319 (8th Cir. 1984)).

⁶⁷*Id.* (citing *Keck*, 773 F.2d at 759; *Farid*, 733 F.2d at 1319). As the court in *Pritchett* correctly observed, mere presence at the crime scene is not sufficient to establish guilt as an aider and abettor. *Id.* (citing *United States v. Johnson*, 19 C.M.R. 146, 149-50 (C.M.A. 1955); *United States v. Guest*, 11 C.M.R. 147, 151-52 (C.M.A. 1953); MCM, 1984, Part IV, para. 1b(3)); accord *United States v. Waluski*, 21 C.M.R. 46 (C.M.A. 1956); see *Wilson*, 7 M.J. at 294 (mere presence of the accused on the premises or even his proximity to the drug is not, standing alone, deemed sufficient to establish his guilt for wrongful possession of drugs). On the other hand, the accused's presence is not necessary for his or her guilt as principal by being an accessory before the fact. See *United States v. Bolden*, 28 M.J. 127 (C.M.A. 1989); *United States v. Carter*, 23 C.M.R. 872 (A.F.B.R. 1957); see *supra* note 57.

(5) the accused later possessed money that had been used to purchase the drugs at issue;⁶⁸ and

(6) the accused's fingerprints subsequently were found on some of the packaging for the drugs.⁶⁹

Of course, none of the above-mentioned factors compelled a finding that the accused in *Pritchett* was guilty as a principal.⁷⁰ Each factor, however, was relevant to that issue. Therefore, evidence supporting these factors could be introduced by the government and used by the trier-of-fact as a means of establishing the accused's criminal responsibility as an aider and abettor. Perhaps even more significantly, *Pritchett* demonstrates the Court of Military Appeals' willingness to apply the extensive federal civilian case law in evaluating whether the accused aided and abetted a drug offense.

Related to the substantive issue of what constitutes aiding and abetting is the matter of how this theory of criminal liability must be pleaded. In *Westmoreland*⁷¹ the accused was convicted of conspiracy to commit murder⁷² and premeditated murder.⁷³ The murder specification alleged, in pertinent part, that the accused "did ... murder" the victim, as if he physically perpetrated the offense by stabbing her.⁷⁴ The government's theory at trial was that the accused was hired by another Marine to murder the other Marine's wife; that the victim was lured to a remote area by the accused and the other Marine; and that the accused killed her there.⁷⁵ Both the government and the defense proceeded to the conclusion of the trial on the merits upon the premise that the accused either fatally stabbed the victim himself, or was not guilty of murder. In this regard, both counsel declined to respond favorably to the military judge's repeated inquiries about whether he should instruct on an aiding and abetting theory for premeditated murder.

During their deliberations, the members essentially asked the military judge whether they could find the accused guilty of murder under an aiding and abetting theory. The defense contended that the accused could not be found guilty as an aider and abettor—in part because the specification as drafted did not encompass that

theory.⁷⁶ The military judge ruled that he would give the aiding and abetting instruction because it was raised by the evidence, and permitted the defense to reopen its case and present a new argument. The defense declined. The military judge nevertheless gave the instruction on aiding and abetting. The members ultimately found the accused guilty, by exceptions and substitutions, of premeditated murder as an aider and abettor.

The Court of Military Appeals in *Westmoreland* affirmed the accused's conviction. The court held that the murder specification, as originally drafted, was sufficient to allege the accused's guilt both as a perpetrator and as an aider and abettor.⁷⁷ The court explained further that the use of exceptions and substitutions was unnecessary; the specification as drafted was sufficient for a finding of guilty under either theory. Actually, the court concluded that the two-thirds concurrence for a finding of guilty to premeditated murder could be achieved by combining the votes of members who were convinced that the accused was guilty as a perpetrator only; members who were convinced that the accused was guilty as an aider and abettor only; members who were convinced that the accused was guilty under both theories; and members who were convinced that the accused was guilty under one or the other theory, even if they were "unsure" of which one.⁷⁸ In other words, the requirement for a two-thirds concurrence applied to the accused's guilt—not to a particular theory of guilt.⁷⁹

On the issue of whether the government was preempted from proceeding upon an aiding and abetting theory because of its contention that the accused was guilty of murder as a perpetrator or not at all, the court wrote:

From the outset, the language of the murder specification placed the defense on notice of the alternative theories of guilt available to the Government in its prosecution. When the military judge decided to instruct only on the theory that [the accused] had killed the victim—as the testimony seemed to indicate—[the accused] did not acquire a vested right to have his guilt determined only on this basis.⁸⁰

⁶⁸ *Pritchett*, 31 M.J. at 218 (citing *United States v. Wesson*, 889 F.2d 134 (7th Cir. 1989); *United States v. Natel*, 812 F.2d 937, 941-42 (5th Cir. 1987); *United States v. Raper*, 676 F.2d 841, 849 (D.C. Cir. 1982)); *id.* at 219 (citing *United States v. Kelly*, 888 F.2d 732, 742-43 (11th Cir. 1989); *United States v. Weaver*, 594 F.2d 1272 (9th Cir. 1979)).

⁶⁹ *Id.* at 219 (citing *United States v. Noibi*, 780 F.2d 1419 (8th Cir. 1986); *United States v. Pantoja-Soto*, 739 F.2d 1520 (11th Cir. 1984); *United States v. Cravero*, 545 F.2d 406 (5th Cir. 1976)).

⁷⁰ See generally *Wilson*, 7 M.J. at 294.

⁷¹ 31 M.J. 160 (C.M.A. 1990).

⁷² See UCMJ art. 81.

⁷³ See *id.* art. 118.

⁷⁴ *Westmoreland*, 31 M.J. at 161-62.

⁷⁵ *Id.* at 162.

⁷⁶ *Id.* at 163.

⁷⁷ *Id.* at 165.

⁷⁸ *Id.* at 165-66; accord *United States v. Vidal*, 23 M.J. 319 (C.M.A.), cert. denied, 481 U.S. 1052 (1987).

⁷⁹ See *Vidal*, 23 M.J. at 324-25.

⁸⁰ *Westmoreland*, 31 M.J. at 166.

Moreover, because the military judge offered the defense the opportunity to reopen its case and argue again, no prejudice was apparent.⁸¹

Westmoreland makes clear that an aiding and abetting theory of guilt need not be alleged explicitly in a specification, and that the defense is always on notice that it may be required to defend against this theory of criminal responsibility. *Westmoreland* seems to reduce the probability that the defense can compel the military judge to grant a motion for a bill of particulars⁸² to discover—if not narrow—the government's theory or theories of guilt. Major Milhizer.

Legal Efficacy in a Guilty Plea Case

*United States v. Ivey*⁸³ is the latest reported case to address the legal efficacy requirement⁸⁴ for forgery under military law.⁸⁵ "Legal efficacy," as the term implies,

relates to the writing's or the signature's legal effect. For a writing or signature to have legal efficacy, it "must be one which would, if genuine, apparently impose a legal liability on another, as a check or promissory note, or change that person's legal rights or liabilities to that person's prejudice, as a receipt."⁸⁶ A writing or signature that lacks legal efficacy cannot be the subject of a forgery under article 123.

Although the requirement for legal efficacy long has been enforced by the military's appellate courts,⁸⁷ the importance of this requirement was reemphasized in the landmark case of *United States v. Thomas*.⁸⁸ In *Thomas* the Court of Military Appeals determined that a false credit reference document lacked legal efficacy and, therefore, it could not be the subject of a forgery.⁸⁹ The court reached this conclusion even though the accused intended to use the writing to obtain a loan.⁹⁰ Following *Thomas*, several forgery convictions were reversed

⁸¹ *Id.*

⁸² See R.C.M. 906(b)(6) and discussion.

⁸³ CM 9000434 (A.C.M.R. 28 Jan. 1991).

⁸⁴ MCM, 1984, Part IV, para. 48b, sets forth the elements of proof for forgery by making or altering, and by uttering. The second element of proof for both types of forgery, as reflected below, concerns legal efficacy.

(1) *Forgery—making or altering.*

(a) That the accused falsely made or altered a certain signature or writing;

(b) That the signature or writing was of a nature which would, if genuine, apparently impose a legal liability on another or change another's legal rights or liabilities to that person's prejudice; and

(c) That the false making or altering was with the intent to defraud.

(2) *Forgery—uttering.*

(a) That a certain signature or writing was falsely made or altered;

(b) That the signature or writing was of a nature which would, if genuine, apparently impose a legal liability on another or change another's legal rights or liabilities to that person's prejudice;

(c) That the accused uttered, offered, issued, or transferred the signature or writing;

(d) That at such time the accused knew that the signature or writing had been falsely made or altered; and

(e) That the uttering, offering, issuing or transferring was with intent to defraud.

Id. (emphasis in original).

⁸⁵ See UCMI art. 123.

⁸⁶ MCM, 1984, Part IV, para. 48c(4).

⁸⁷ See, e.g., *United States v. Diggers*, 45 C.M.R. 147 (C.M.A. 1972) (forged military order to obtain approval of travel request had legal efficacy); *United States v. Phillips*, 34 C.M.R. 400 (C.M.A. 1964) (carbon copy of allotment authorization form lacked legal efficacy); *United States v. Farley*, 29 C.M.R. 546 (C.M.A. 1960) (false insurance applications lacked legal efficacy); *United States v. Noel*, 29 C.M.R. 324 (C.M.A. 1960) (form similar to a letter of credit had legal efficacy); *United States v. Addye*, 23 C.M.R. 107 (C.M.A. 1957) ("Request for Partial Payment" letter had legal efficacy); *United States v. Strand*, 20 C.M.R. 13 (C.M.A. 1955) (letter lacked legal efficacy); *United States v. Jedgele*, 19 M.J. 1987 (A.F.C.M.R. 1985) (bankcard charge slip had legal efficacy); *United States v. Gilbertsen*, 11 M.J. 675 (N.M.C.M.R. 1981) (suspect's rights acknowledgement form lacked legal efficacy); *United States v. Schwarz*, 12 M.J. 650 (A.C.M.R. 1981), *aff'd*, 15 M.J. 109 (C.M.A. 1983) (allotment form had legal efficacy); *United States v. Benjamin*, 45 C.M.R. 799 (N.C.M.R. 1972) (prescription form had legal efficacy).

⁸⁸ 25 M.J. 396 (C.M.A. 1988). For a discussion of *Thomas*, see TJAGSA Practice Note, *Forgery and Legal Efficacy*, *The Army Lawyer*, June 1989, at 40.

⁸⁹ *Thomas*, 25 M.J. at 401-02.

⁹⁰ As the court wrote in *Thomas*,

The record before us leaves no doubt that the false document was intended to facilitate appellant's obtaining the loan and that, if genuine, it might have had a decisive effect on the application. In that sense, the document could readily be seen "as a step in a series of acts which might perfect a legal right or liability." But, again, the test for forgery—and derivatively for uttering a forged writing—is not whether the writing was a cause in fact or a *sine qua non* but whether it "would, if genuine, apparently impose a legal liability on another or change his legal right or liability to his prejudice."

Id. at 401 (citations omitted).

because the subject documents lacked legal efficacy.⁹¹ In other cases, the courts concluded that the subject documents had legal efficacy and affirmed forgery convictions.⁹²

The accused in *Ivey* was convicted of forging an application for a checking account.⁹³ The court of review noted in *Ivey* that a checking account application, "when accepted by the bank, creates a contract, conferring rights and imposing obligations on both the bank and the depositor."⁹⁴ The accused and his co-conspirators ultimately opened a checking account, which apparently was connected in some way with the "forged" application.⁹⁵ The account was established, in the court of review's words, "as part of a scheme to acquire items of value by writing checks."⁹⁶ Based on these matters, the court of review in *Ivey* concluded that the application had legal efficacy.⁹⁷

This conclusion, however, may not necessarily follow. Although a checking account actually may create legal rights and impose legal obligations, an application for an account does not necessarily perform the same function. If the application was only a preliminary step in the process of securing the bank's approval of a checking account, the application would lack legal efficacy.⁹⁸ The application likewise would lack legal efficacy—even if the document was a prerequisite to opening an account—if the application was not a dispositive factor in the bank's decision to approve the applicant's opening an account.⁹⁹ On the other hand, the application would have legal efficacy if it alone determined whether the bank would open an account. As one court cogently has

observed, "cases involving forgery are fact specific."¹⁰⁰ *Ivey* should be no different.

Unfortunately, the facts in *Ivey* are not well developed. Because the accused pleaded guilty, the government was not required to prove that the checking account application had legal efficacy. The actual writing was not introduced at trial; therefore, it was not a part of the record before the appellate court.¹⁰¹ The court's references to the providence inquiry and the stipulation of fact do not address expressly the legal efficacy issues that are raised in cases such as *Thomas* and *Hopwood*. Consequently, the *Ivey* court's opinion reflects insufficient facts to establish that the checking account application had legal efficacy.

The court of review nevertheless may have concluded in *Ivey* that an express showing of legal efficacy is not necessary in a guilty plea case.¹⁰² Although a plea of guilty does not obviate the requirement for the accused to admit to conduct that satisfies the elements of proof for the charged offense,¹⁰³ the Court of Military Appeals has become increasingly reluctant to disturb convictions based upon facially provident guilty pleas.¹⁰⁴ *Ivey* may say less about legal efficacy than it does about the Army Court of Military Review's willingness to follow this trend. Major Milhizer.

Wrongful Appropriation of BAQ

The accused in *United States v. Watkins*¹⁰⁵ pleaded guilty, *inter alia*, to wrongfully appropriating over

⁹¹E.g., *United States v. Hopwood*, 30 M.J. 146 (C.M.A. 1990) (loan application lacked legal efficacy); *United States v. Victorian*, 31 M.J. 830 (N.M.C.M.R. 1990) (loan application lacked legal efficacy); *United States v. Vogan*, 27 M.J. 883 (A.C.M.R. 1989) (ration control anvil card lacked legal efficacy); *United States v. Walker*, 27 M.J. 878 (A.C.M.R. 1989) (military identification card lacked legal efficacy); *United States v. Ross*, 26 M.J. 933 (A.C.M.R. 1988) (prescription lacked legal efficacy); *United States v. Hart*, CM 8800211 (A.C.M.R. 9 Sept. 1988) (unpub.) (ration control anvil cards lacked legal efficacy); *United States v. Grayson*, CM 8702884 (A.C.M.R. 27 July 1988) (unpub.) (honorable discharge certificate, certificate of achievement, and certificate for participation in tank gunnery competition lacked legal efficacy); *United States v. Smith*, CM 8702513 (A.C.M.R. 29 June 1988) (unpub.) (application forms for Armed Forces Identification Cards lacked legal efficacy). See generally TJAGSA Practice Note, *Court Strictly Interprets Legal Efficacy*, *The Army Lawyer*, Aug. 1990, at 35; TJAGSA Practice Note, *Legal Efficacy as a Relative Concept*, *The Army Lawyer*, Jan. 1990, at 34.

⁹²E.g., *United States v. Victorian*, 31 M.J. 830 (N.M.C.M.R. 1990) (motor vehicle installment contract had legal efficacy); *United States v. Nichols*, 27 M.J. 909 (A.F.C.M.R. 1989) (loan application had legal efficacy).

⁹³*Ivey*, slip op. at 2.

⁹⁴*Id.* The court observed further:

The bank is obliged to pay checks drawn on the account, perform certain bookkeeping functions, and provide blank checks, the means used in this case to commit the other offenses [of conspiracy to commit forgery and larceny, and attempted larceny]. The depositor is obliged to pay service charges and reimburse the bank for overdrafts.

Id. (citing 10 Am. Jur.2d Banks §§ 493, 494, 540 (1963)).

⁹⁵The court's opinion in *Ivey* does not describe the connection expressly.

⁹⁶*Ivey*, slip op. at 2.

⁹⁷*Id.*

⁹⁸See *Hopwood*, 30 M.J. at 146-47; *Thomas*, 26 M.J. at 399-400.

⁹⁹See *Hopwood*, 30 M.J. at 146-47; *Thomas*, 26 M.J. at 399-400.

¹⁰⁰*Nichols*, 27 M.J. at 911.

¹⁰¹*Ivey*, slip op. at 2.

¹⁰²*Hopwood* and *Thomas*, on the other hand, were contested cases.

¹⁰³See generally *United States v. Care*, 40 C.M.R. 247 (C.M.A. 1969); *United States v. Johnson*, 25 M.J. 553 (A.C.M.R. 1987).

¹⁰⁴See *United States v. Thompson*, 32 M.J. 65, 67 (C.M.A. 1991); *United States v. Harrison*, 26 M.J. 474, 476 (C.M.A. 1988).

¹⁰⁵32 M.J. 527 (A.C.M.R. 1990).

\$2000.¹⁰⁶ During the providence inquiry, the accused told the military judge that she received a basic allowance for quarters (BAQ) while residing in civilian housing.¹⁰⁷ In December 1988, the accused moved into government housing, which made her ineligible for BAQ. In February 1989, the accused's first sergeant became aware that the accused was continuing to receive BAQ. He advised the accused that she should set funds aside because the government eventually would recoup the BAQ payments. The accused told her first sergeant that she had informed the housing office to notify the finance office that her BAQ payments should terminate. The next month, the first sergeant again noticed that the accused still was receiving BAQ. The accused told her first sergeant that she had asked the housing office to stop the BAQ payments. The payments, however, did not terminate until several months later.

The accused was charged with the wrongful appropriation of United States currency in the amount of the BAQ payments. The military judge accepted her guilty plea as provident. The judge relied, in part, upon the accused's statement that she "'should have went back [to the housing office] every month because [she] knew that it wasn't [her] money and it was the government's money and [she] should have stopped it.'"¹⁰⁸

The Army Court of Military Review concluded that the accused's plea of guilty to wrongful appropriation was improvident. The court explained that, to constitute

wrongful appropriation, under a withholding theory,¹⁰⁹ "the withholding must be without the consent of the owner (the government) and with a concomitant criminal intent on the part of the accused to deprive that owner of the use and benefit of the property."¹¹⁰ According to the court in *Watkins*, the providence inquiry suggested that the accused came into possession of the funds legitimately, and that the government's failure to recoup the funds quickly was a result of its inaction following notification by the accused.¹¹¹ The court wrote:

These circumstances are inconsistent with the conclusion that the [accused] withheld BAQ without the consent of the government or with intent to steal. Rather, they tend to establish that she failed to repay moneys owed to the government because of the failure of government officials to take collection action after [the accused] notified them to do so. In the absence of a fiduciary duty to account, a withholding of funds otherwise lawfully obtained is not larcenous.¹¹²

The court in *Watkins* also observed that the accused's admission of guilt during the providence inquiry cannot make provident an otherwise defective guilty plea.¹¹³ The court explained that it doubted that a soldier has a duty to account for overpayments of pay or allowances, at least in the absence of any fraudulent inducement of the overpayment by the soldier.¹¹⁴ The court concluded that it did not have to reach that issue in *Watkins* because the

¹⁰⁶UCMJ art. 121.

¹⁰⁷*Watkins*, 32 M.J. at 528. The court in *Watkins* explained that soldiers who do not live in government housing normally are entitled to BAQ. *Id.*

¹⁰⁸*Id.*

¹⁰⁹UCMJ article 121 was designed to reach all the common-law and traditional statutory forms of larceny and wrongful appropriation, including the wrongful withholding theory. See *United States v. Mervine*, 26 M.J. 482, 483 (C.M.A. 1988) (citing Hearings on H.R. 2498 Before a Subcomm. of the House Armed Services Comm., 81st Cong., 1st Sess. 815, 1232 (1949)); see also *United States v. Norris*, 8 C.M.R. 36, 39 (C.M.A. 1953). See generally TJAGSA Practice Note, *Larceny of a Debt: United States v. Mervine Revisited*, The Army Lawyer, Dec. 1988, at 29, 30.

¹¹⁰*Id.* at 529 (MCM, 1984, Part IV, para. 46c(1)(d) 7 (f)). On several occasions the military's appellate courts have affirmed larceny convictions under a wrongful withholding theory. In *United States v. Amie*, 22 C.M.R. 304 (C.M.A. 1957), for example, the accused received \$80 from another soldier with the understanding that he would purchase a money order and forward it as partial payment for the other soldier's automobile. *Id.* at 306. The accused instead purchased a money order in the amount \$70, gave the other soldier an altered receipt showing that \$80 had been forwarded, and retained \$10 for himself. The Court of Military Appeals affirmed the larceny conviction based upon the theory that the accused wrongfully retained the \$10 provided to him by the other soldier. *Id.* at 308. More recently, in *United States v. Moreno*, 23 M.J. 622 (A.F.C.M.R. 1986), *per. denied*, 24 M.J. 348 (C.M.A. 1987), the accused discovered that \$10,033 had been deposited mistakenly into his credit union account. *Id.* at 623. The accused then wrote two checks totalling \$10,000. He later denied knowing about the money. *Id.* at 626. Using a wrongful withholding theory, the court affirmed the accused's conviction for larceny of the \$10,000.

¹¹¹*Watkins*, 32 M.J. at 529.

¹¹²*Id.* (citation omitted) (citing *United States v. Ford*, 30 C.M.R. 3 (C.M.A. 1960) (accused might be guilty of larceny by inducing a supply clerk to obtain for him government property, to which he was not entitled, for a prearranged payment); *United States v. McFarland*, 23 C.M.R. 266 (C.M.A. 1957) (larceny by withholding does not occur when the accused receives property that he knows was stolen from another if the accused did not participate in the theft); *United States v. Johnson*, 30 M.J. 930 (A.C.M.R. 1990) (obtaining casual pay by misrepresentations or a failure to inquire into the legitimacy of receiving the pay does not constitute larceny by false pretenses)).

¹¹³*Id.* at 529.

¹¹⁴*Id.* (citing *United States v. Castillo*, 18 M.J. 590 (N.M.C.M.R. 1984) (accused's conduct did not amount to larceny by withholding, in part, because he had no fiduciary relationship with the government that required him to account for money he improperly received)).

accused's statement that she reported the overpayments on two occasions was "inconsistent" with the *mens rea* required for wrongful appropriation.¹¹⁵ Major Milhizer.

Attempted Larceny and Wrongful Appropriation Found Multiplicious

In *United States v. Jones*¹¹⁶ the Air Force Court of Military Review concluded that wrongful appropriation¹¹⁷ of property and attempted larceny¹¹⁸ of the value of the same property were multiplicious for findings. The pertinent facts in *Jones* are simple. The accused went to the refund counter of a base exchange to obtain a refund for a steam brush she had purchased earlier.¹¹⁹ While she was at the refund counter, she also attempted to receive a "refund" for a bedspread. The accused, however, had not purchased the bedspread—she had placed it in her shopping cart moments earlier. The accused received a refund for the steam brush, for which she had a receipt, but not for the bedspread. Two days later the accused attempted to obtain a "refund" for other items—after shave lotion and a compact disc player—which she had picked up at the exchange without purchasing. Like the bedspread, she was denied a refund for these items because she had no receipt. The accused ultimately was convicted of wrongful appropriation of the bedspread, after shave lotion, and compact disc player, as well as attempted larceny of money equal to the value of these three items.

The Air Force Court of Military Review held in *Jones* that the wrongful appropriation and attempted larceny

charges were multiplicious for findings purposes.¹²⁰ In reaching this conclusion, the court did not apply expressly any of the several tests for findings multiplicity recognized by the Court of Military Appeals.¹²¹ Instead, the *Jones* court analogized the offenses at issue in the instant case with the issues considered in *United States v. Donegan*¹²² and *United States v. Gans*.¹²³ In both *Donegan* and *Gans*, the appellate courts held that submitting false claims¹²⁴ and the larcenies resulting from those claims¹²⁵ were multiplicious for findings purposes.¹²⁶ The court in *Jones* observed further that "in *Donegan*, the two matters were held multiplicious for findings even though there was a one day variance between submission of the false claim and the beginning of the larceny."¹²⁷ Furthermore, the Air Force court felt that its conclusion that the offenses were multiplicious for findings was "strengthened" by the fact that the two alleged offenses in *Jones* occurred contemporaneously.¹²⁸

The multiplicity issue raised in *Jones*, however, may not be so simple. In 1986, the Court of Military Appeals concluded, in *United States v. Moore*,¹²⁹ that false claims, and the attempted larcenies of money that result therefrom, were not multiplicious for findings.¹³⁰ The court wrote that because the false claims specifications did not allege that the false claims were "the means by which the attempt was made,"¹³¹ they were separate from the larcenies for findings purposes. In *United States v. Allen*,¹³² decided in 1983, the court held that bad-check offenses¹³³ were multiplicious for findings with the resulting larcenies. The court in *Allen* concluded that the

¹¹⁵ *Id.* at 529. The *mens rea* requirement for wrongful appropriation is a specific "intent temporarily to deprive or defraud another person of the use and benefit of the property or temporarily to appropriate the property for the use of the accused or for any person other than the owner." MCM, 1984, Part IV, para. 46b(2)(d).

¹¹⁶ 31 M.J. 906 (A.F.C.M.R. 1990).

¹¹⁷ See UCMJ art. 121.

¹¹⁸ See *id.* art. 80.

¹¹⁹ *Jones*, 31 M.J. at 907.

¹²⁰ The court in *Jones* acknowledged that the defense had not objected at trial on the basis of multiplicity for findings. The court nonetheless held that waiver did not apply to issues involving multiplicity for findings purposes. *Id.* (citing *United States v. Holt*, 16 M.J. 393 (C.M.A. 1983)).

¹²¹ Among the tests for multiplicity recognized by the court are the "separate elements test," *United States v. Blockburger*, 284 U.S. 299 (1932) (cited in *United States v. Cox*, 18 M.J. 72, 74 (C.M.A. 1984)); the "fairly embraced test," *United States v. Carter*, 30 M.J. 179, 180-82 (C.M.A. 1990); *United States v. Baker*, 14 M.J. 361, 368 (C.M.A. 1982); the "means test," *United States v. Moore*, 17 M.J. 318 (C.M.A. 1984) (summary disposition); and the "Congressional intent test." *United States v. Guerrero*, 28 M.J. 223, 226 (C.M.A. 1989); *United States v. Rodriguez*, 18 M.J. 363, 366 (C.M.A. 1984). Unfortunately, the Court of Military Appeals has not always applied a single test in each decision; the court sometimes seems to use a hybrid of many tests. *E.g.*, *United States v. Stottlemire*, 28 M.J. 477, 478-80 (C.M.A. 1989).

¹²² 27 M.J. 576 (A.F.C.M.R. 1988).

¹²³ 23 M.J. 540 (A.C.M.R. 1986).

¹²⁴ See UCMJ art. 132.

¹²⁵ See UCMJ art. 121.

¹²⁶ *Donegan*, 27 M.J. at 576-78; *Gans*, 23 M.J. at 542.

¹²⁷ *Jones*, 31 M.J. at 907.

¹²⁸ *Id.*

¹²⁹ 17 M.J. 318 (C.M.A. 1984) (summary disposition).

¹³⁰ *Id.* at 318-19.

¹³¹ *Id.* at 318.

¹³² 16 M.J. 395 (C.M.A. 1983).

¹³³ See UCMJ art. 123a.

offenses were multiplicitious because the bad-check specifications expressly alleged that the bad checks were the means by which the larcenies were committed.¹³⁴ These cases and other decisions¹³⁵ reflect that the precise language in the specifications—as well as the underlying conduct that they address—are determinative of whether offenses are multiplicitious for findings under the “means test” or the “fairly embraced test.”¹³⁶

The Air Force court in *Jones* did not discuss or attempt to distinguish *Moore*, *Allen*, or the other decisions cited above.¹³⁷ These Court of Military Appeals cases, however, should have been addressed because the wrongful appropriation and attempted larceny specifications in *Jones* apparently did not fairly embrace each other.¹³⁸ In this regard, *Jones*’s reliance upon *Donegan* is misplaced because the false claims specifications at issue in *Donegan* embraced the resulting larcenies.¹³⁹ *Gans*—the other case relied upon by the court in *Jones*—also has doubtful precedential value because it conflicts with the earlier Court of Military Appeals case upon which the *Gans* court relied.¹⁴⁰

Whether the *Jones* court correctly applied the “fairly embraced” or “means” tests does not address the underlying propriety of these tests for resolving multiplicity issues. As decisions such as *Holt*¹⁴¹ make clear, artful drafting by omission can avoid findings multiplicity. Whether that represents “a fundamentally fair disposition

of a multiplicity issue,”¹⁴² may be subject to future debate. Major Milhizer.

Procurement Fraud Prosecutions: May Defendant Be Convicted of Both General and Specific Conspiracy Statutes? Yes, Says Eleventh Circuit

In *United States v. Lanier*¹⁴³ the United States Court of Appeals for the Eleventh Circuit affirmed the defendant’s criminal conviction, both for conspiring to defraud the United States under the “general” conspiracy statute¹⁴⁴ and for conspiring to defraud the United States with respect to false claims under a “specific” conspiracy statute,¹⁴⁵ even though *only one conspiracy* was proven by the evidence. *Lanier* is an important new weapon for judge advocates in Alabama, Florida, and Georgia who are prosecuting procurement fraud as Special Assistant United States Attorneys (SAUSAs).

Lanier effectively held that the participants in a criminal agreement to defraud the United States through the “payment or allowance of any false, fictitious or fraudulent claim”¹⁴⁶ also are conspiring to steal government property—that is, the money to be paid under the false claim. Accordingly, SAUSAs now can charge under both 18 U.S.C. section 371—the general conspiracy statute—and 18 U.S.C. section 286—the specific conspiracy statute—in an indictment or information. Both charges go to the jury on the merits and the United States need not

¹³⁴ *Allen*, 16 M.J. at 395-96.

¹³⁵ *Holt*, 16 M.J. at 394 (offenses involving wrongful use of a false military identification card were not multiplicitious for findings with resulting larcenies because the allegations in the specifications did not “fairly embrace” each other); see *United States v. Lee*, 17 M.J. 321 (C.M.A. 1984) (summary disposition); *United States v. Smith*, 17 M.J. 320 (C.M.A. 1984) (summary disposition); *United States v. Ward*, 15 M.J. 377 (C.M.A. 1983) (summary disposition).

¹³⁶ *Accord United States v. Jones*, 23 M.J. 301, 303 (C.M.A. 1987).

¹³⁷ See *supra* notes 134-36.

¹³⁸ The specifications at issue in *Jones* are not reproduced in the court’s opinion. Nevertheless, the attempted larceny and wrongful appropriation specifications apparently did not fairly embrace each other because the court’s remedy was to consolidate the specifications so that the relationship of the two offenses was evident. *Jones*, 31 M.J. at 908.

¹³⁹ *Donegan*, 27 M.J. at 577.

¹⁴⁰ The court in *Gans* concluded that the false claims and resulting larcenies were multiplicitious because the “record of trial establishe[d] that the factual circumstances surrounding the making of a false claim constituted the basis for both charges.” *Gans*, 23 M.J. at 542. Therefore, the court apparently found that the specifications were multiplicitious for findings even though they did not fairly embrace each other or allege that one crime was the means by which the other was committed. In support of its rationale, the court in *Gans* cited to *United States v. Allen*, 16 M.J. 395 (C.M.A. 1983). *Allen* held that bad-check offenses were multiplicitious for findings with resulting larcenies because the bad-check specifications expressly alleged that the bad checks were the means by which the larcenies were committed. *Allen*, 16 M.J. at 396. Accordingly, *Allen* undercuts, rather than supports, the rationale in *Gans*.

¹⁴¹ 16 M.J. 393 (C.M.A. 1983); *accord Jones*, 23 M.J. 301 (C.M.A. 1987).

¹⁴² In an expression of resignation, if not satisfaction, the Army Court of Military Review once observed:

Although military “legal purists” may wince at the thought, it appears that our current military rules of multiplicity are a curious blend of military due process, equity, and policy considerations. Somehow, through this maze, our appellate courts, with the help of an overall enlightened “field” legal practice, are basically reaching fundamentally fair dispositions of multiplicity issues.

United States v. Barnum, 24 M.J. 729, 731 n.3 (A.C.M.R. 1987).

¹⁴³ 920 F.2d 887 (11th Cir. 1991).

¹⁴⁴ 18 U.S.C. § 371 (1988).

¹⁴⁵ *Id.* § 286.

¹⁴⁶ *Id.*

elect between them at the close of its evidence. Moreover, the defendant may be convicted for either or both offenses, with the possibility of substantially increased punishment.¹⁴⁷ In sum, the two offenses are multiplicitous neither for findings nor for sentencing, even though only one conspiracy is proved by the evidence.

In *Lanier* the Small Business Administration subcontracted with Stevens Oil Company to supply fuel oil to the Defense Fuel Supply Center (DFSC). Stevens Oil was to deliver oil for the DFSC to Fort Stewart, Hunter Army Air Field, and other military facilities in the Savannah, Georgia, area. Terry Lanier was the office manager of Stevens Oil. Lanier, the president of Stevens Oil, and other Stevens Oil employees conspired to bill the government for fuel oil that never was delivered. The criminal scheme—a single conspiracy—involved making and submitting for payment a number of false “tickets” or invoices showing that government oil tanks had been filled, and bribing a civilian employee tasked with verifying these fuel deliveries. One object of the conspiracy was to make claims for thousand of gallons of fuel oil that never were delivered.

The government also made advance payments of some three million dollars to Stevens Oil. The subcontract required these monies to be deposited in a joint account. Stevens Oil, however, put the monies in other accounts and used the funds to pay off unrelated debts and otherwise to run its corporate operations. This embezzlement of United States monies was another object of the conspiracy. Apparently, the evidence for the “general” conspiracy to steal government property involved not only the monies to be obtained through the filing of false claims, but also this improper use or embezzlement of the advance payments.¹⁴⁸ Accordingly, only one conspiracy to defraud the United States occurred, but it had several purposes.

A grand jury sitting in the Southern District of Georgia returned an indictment against Lanier and his co-defendants both for conspiring to steal government property and defraud the United States, and for conspiring to defraud the government by obtaining payment of false claims. At trial, Lanier and the other defendants were convicted of both conspiracy counts.

On appeal, Lanier argued before the Eleventh Circuit that the trial judge improperly permitted both conspiracy counts to go to the jury “when the evidence established only one agreement with multiple purposes.”¹⁴⁹ He argued that convicting a party to a single conspiracy of both the “general” conspiracy statute and a “specific” conspiracy statute violated the double jeopardy clause.¹⁵⁰ Specifically, he alleged that a conviction for both offenses was wrong because the “general” conspiracy statute is a lesser-included offense of the charged “specific” conspiracy offense. Accordingly, a conviction under both statutes effectively would punish him twice for the same criminal conduct.

In an interesting analysis of congressional intent, and multiplicity generally, the Eleventh Circuit rejected Lanier’s argument. First, the court discussed Lanier’s double jeopardy claim. It noted that Congress made “two slightly different”¹⁵¹ offenses—18 U.S.C. section 371, which carries a maximum imprisonment of five years, and 18 U.S.C. section 286, which carries a maximum jail term of ten years. The court then pointed out that the double jeopardy clause prohibits only “successive prosecutions for essentially the same offense.”¹⁵² Accordingly, because “minimal differences”¹⁵³ exist between 18 U.S.C. section 371 and 18 U.S.C. section 286, it ruled that the government could decide to prosecute a person in two separate trials. “Such consecutive prosecutions,” wrote the court, “would give the government two chances to find a jury that agrees with the government’s

¹⁴⁷Under the United States Sentencing Guidelines, however, the two conspiracy counts likely would be grouped together, with the result that the increased punishment would be fairly small. See United States Sentencing Guidelines, chap. 3, part D, § 3D1.1 (1989).

¹⁴⁸Larceny of United States property and embezzlement of United States property both are violations of the same statute—18 U.S.C. § 641 (1988). Although larceny and embezzlement are slightly different, United States attorneys often charge both in a criminal prosecution. An indictment charging a theft of United States’ monies may allege that the defendant “did knowingly embezzle, steal, purloin and convert” ... “a thing of value of the United States.” See 18 U.S.C. § 641 (1988). Proof, however, is required of only a larceny or embezzlement or conversion or purloining. See generally, U.S. Dept. of Justice, *United States Attorneys’ Manual*, vol. III(a), § 9-12.326 (1990):

when a statute specifies several alternative ways in which an offense can be committed, the indictment may allege the several ways in the conjunctive, and this fact neither makes the indictment bad for duplicity nor precludes a conviction if only one of the allegations linked in the conjunctive in the indictment is proven.

(quoting *United States v. McCann*, 465 F.2d 147, 162 (5th Cir. 1971), cert. denied, 412 U.S. (1972)).

¹⁴⁹*Lanier*, 920 F.2d at 892.

¹⁵⁰See U.S. Const. amend. V.

¹⁵¹*Lanier*, 920 F.2d at 893.

¹⁵²*Id.* at 893.

¹⁵³*Id.*

view of the evidence."¹⁵⁴ The double jeopardy clause forbids such prosecutions. Additionally, the danger is that a jury might reach a compromise verdict when faced with both conspiracy charges and "might split the difference and convict on one of the two counts, on the same evidence."¹⁵⁵ If only one conspiracy were charged, the jury might acquit because of insufficient evidence.

The court, however, disregarded both of these arguments because, in *Lanier's* case, not only were both conspiracies tried at the same time, but also the jury returned guilty verdicts on both. The court recognized that Congress could have made a violation under 18 U.S.C. section 286 a fifteen-year offense. Because it did not, however, the Eleventh Circuit concluded that "our sole inquiry must focus on whether Congress intended to permit prosecution under both statutes for the same conspiracy."¹⁵⁶ Relying on the United States Supreme Court's opinion in *Albernaz v. United States*,¹⁵⁷ the Eleventh Circuit concluded that Congress intended to allow prosecutions for both offenses. *Albernaz* stands for the proposition that differences in the elements of proof control in determining congressional intent. The court noted that 18 U.S.C. section 371 requires proof of an overt act, whereas 18 U.S.C. section 286 does not. On the other hand, 18 U.S.C. section 286 requires proof of a conspiracy to defraud through the use of a false, fictitious, or fraudulent claim, whereas 18 U.S.C. section 371 does not. Accordingly, because each offense requires proof of an element not required by the other, the Eleventh Circuit presumed that Congress intended two separate offenses and did not intend for 18 U.S.C. section 371 to be a lesser included offense of 18 U.S.C. section 286. Had a "clear indication of contrary legislative intent"¹⁵⁸ existed, that presumption would be overcome. Because no such indication existed, however, the *Lanier* court concluded that "Congress intended to permit punishment under both section 371 and section 286 for a single conspiracy."¹⁵⁹

SAUSAs practicing on Army installations located in Alabama, Florida, and Georgia should consider and use *Lanier* in investigating and prosecuting procurement fraud arising out of false claims. SAUSAs located in other circuits should cite *Lanier* and argue for its adoption in their circuits.¹⁶⁰ Because the vast majority of pro-

curement fraud cases at the installation level involve the making of false, fictitious, or fraudulent claims, the *Lanier* decision may prove to be one of the most important weapons in the fight against procurement fraud. Major Borch.

Legal Assistance Items

The following notes have been prepared to advise legal assistance attorneys of current developments in the law and in legal assistance program policies. They also can be adapted for use as locally published preventive law articles to alert soldiers and their families about legal problems and changes in the law. We welcome articles and notes for inclusion in this portion of *The Army Lawyer*. Submissions should be sent to The Judge Advocate General's School, ATTN: JAGS-ADA-LA, Charlottesville, VA 22903-1781.

Tapes Available to Assist in Operation Desert Storm Demobilization

Several classes taught during the 28th Legal Assistance Continuing Legal Education Course at The Judge Advocate General's School (TJAGSA) addressing Operations Desert Shield and Desert Storm demobilization legal issues were placed on video tape. Legal assistance attorneys desiring copies of these videotaped classes should mail blank VHS video tape cassettes to TJAGSA, Visual Information Branch, 600 Massie Road, Charlottesville, Virginia, 22903-1781 with a note describing the classes desired.

Video tapes are available on the following topics:

- (1) **Veterans' Reemployment Rights Law.** A two-hour class taught by Major Austin Smith, United States Marine Corps, Assistant National Ombudsman, National Committee for Employer Support of the Guard and Reserve.
- (2) **Desert Shield and Desert Storm Tax Issues.** A one-hour class taught by Commander Kusiak, Chair, Department of Defense Armed Forces Tax Council; and Assistant for Military Tax Law, Office of the Secretary of Defense.

¹⁵⁴*Id.* at 893.

¹⁵⁵*Id.*

¹⁵⁶*Id.*

¹⁵⁷450 U.S. 333 (1981).

¹⁵⁸*Lanier*, 920 F.2d at 894 (quoting *Albernaz*, 450 U.S. at 340).

¹⁵⁹*Id.* at 895.

¹⁶⁰The Eleventh Circuit suggested in *Lanier* that at least three other circuit courts of appeal would agree that a defendant may be convicted for both a general conspiracy and specific conspiracy even though a single conspiracy is proven by the evidence. See *United States v. Barton*, 647 F.2d 224, 234-236 (2d Cir. 1981), *cert. denied*, 454 U.S. 857 (1981); *United States v. Nakashian*, 820 F.2d 549, 553 (2d Cir. 1987), *cert. denied*, 484 U.S. 963 (1987); *United States v. Marren*, 890 F.2d 924, 936-37 (7th Cir. 1989); *United States v. Timberlake*, 767 F.2d 1479, 1481-82 (10th Cir. 1985), *cert. denied*, 474 U.S. 1101 (1986).

(3) Soldiers' and Sailors' Civil Relief Act. A two-hour class addressing the act, taught by Major James Pottorff, Instructor, Administrative and Civil Law Division, TJAGSA.

Veterans' Law Note

Making Proper Reapplication Under the Veterans' Reemployment Rights Law

An important prerequisite for entitlement to reemployment under the Veterans' Reemployment Rights Law (VRRL) is that the veteran must "make application" to his or her employer within a statutory time period.¹⁶¹ The time allowed under the VRRL varies depending on authorization for entering active duty and the type and length of duty.¹⁶² Courts place the burden on the veteran to prove that all statutory prerequisites, including timely reapplication, have been satisfied.¹⁶³ Accordingly, service members returning from Operations Desert Shield and Desert Storm must understand fully the nature of their obligation to reapply for their former position.

The VRRL does not specify what type of application is required to trigger reemployment rights. A recent case, *Hayse v. Tennessee Department of Conservation*,¹⁶⁴ provides some guidance in defining what types of applications might be insufficient to satisfy the VRRL. The plaintiff in the case, Vernon Hayse, left his employment as a laborer with the Tennessee Department of Conservation to enter the Army in 1983. Before his discharge from the service, Hayse began discussing the possibility of returning to his position with his uncle, who was his immediate supervisor. Hayse's uncle did not know whether Hayse was entitled to reemployment, but advised him to reapply when he left the service.

After leaving the service, Hayse discussed his reemployment possibilities with his uncle during a social gathering and was advised that no openings were presently available. Hayse subsequently raised his reemployment possibilities with his uncle on another occasion. Again, Hayse was told that no positions were available and that applying would be useless.

About one month after his discharge from the service, Hayse began working for another employer in another city. Although he was earning more money in the new

job, his family was not satisfied with the new job location. Hayse terminated his employment after about ten months of working and contacted the Department of Labor. Officials at the Department of Labor convinced Hayse's former employer to offer Hayse a better job. The proposed job, however, entailed a sixty-mile commute; Hayse therefore rejected it.

At trial, the employer introduced evidence showing that Hayse never appeared at the Department of Conservation's personnel office to reapply. It also introduced testimony that, had Hayse applied, he would have been returned to his former position as a matter of company policy, which was based on federal and state law.

The court concluded that the question of whether adequate notice was provided is based on "a case-by-case determination which focuses on the intent and reasonable expectations of both the former employee and employer, in light of all the circumstances."¹⁶⁵ According to the court, the type of notice required depends on a myriad of factors, including the size of the employer, the number of employees, and the length of time the veteran has been away.

The court applied this analytical framework to the case and concluded that Hayse did not provide adequate notice to his employer. The court, citing precedent holding that the required application under the VRRL requires more than mere inquiry,¹⁶⁶ found not only that Hayse failed to complete an application for the position, but also that he failed to make his intentions known to someone who had actual decision-making authority on hiring. It was unreasonable, in the court's view, to require an employer with over 1600 employees to be bound by a verbal inquiry to a supervisor who happened to be a relative. Moreover, the court did not believe that Hayse reasonably could have expected to have placed his employer on notice under the circumstances.

The court also held that even if adequate notice was provided, Hayse waived his rights under the VRRL by accepting a more lucrative job. Finally, the court ruled that the employer's offer of a new position, with the same duties and responsibilities as his previous job, satisfied the statutory requirement to provide a position of "like seniority, status, and pay," even though it required a sixty-mile commute.¹⁶⁷

¹⁶¹ 38 U.S.C. § 2021 (1988).

¹⁶² The complex statutory structure for determining how much time a veteran has to reapply is set forth in a previous legal assistance note. See TJAGSA Practice Note, *Veterans Law Note: Reserve Reemployment Rights*, The Army Lawyer, Dec. 1990, at 41.

¹⁶³ *Trulson v. Trane Co.*, 738 F.2d 770 (7th Cir. 1984).

¹⁶⁴ 750 F. Supp. 298 (E.D. Tenn. 1989).

¹⁶⁵ *Id.* at 303.

¹⁶⁶ *Lacek v. Peoples Laundry Co.*, 94 F. Supp. 399 (M.D. Pa. 1950).

¹⁶⁷ The court relied on two previous cases to reach this conclusion. See *id.* (citing *Bova v. General Mills, Inc.*, 173 F.2d 138 (6th Cir. 1949); *Schwetzler v. Midwest Dairy Prods. Corp.*, 174 F.2d 612 (7th Cir. 1949)).

The *Hayse* case teaches several important lessons. First, service members returning from Operations Desert Shield and Desert Storm should submit their applications for former jobs to personnel who are in a decision-making position over hiring. Second, although the statute does not require expressly the application to be in writing, service members should provide dated written notices to the responsible persons of their intention to return. Finally, a service member should be flexible in accepting an employer's offer of an alternate position as long as the position provides the like seniority, pay, and status as the job formerly held. Service members who believe that former employers are not living up to VRRP obligations should immediately contact the nearest Department of Labor Veterans' Employment Training Office.¹⁶⁸ Major Ingold.

Real Property Note

FTC Continues Crackdown on Multiple Listing Service Companies

Within the past six months the Federal Trade Commission (FTC) has renewed its investigation and prosecution of local real estate multiple listing service (MLS) companies. These companies, which usually include as members virtually all real estate agencies in a given geographic area, provide a useful service to home sellers and buyers by acting as an information collection and distribution point. The MLS companies, however, usually require member real estate brokers to agree to certain restrictive listing practices and often will refuse to accept real estate listings that do not meet these guidelines. These restrictive practices have been under attack by consumer advocates and have resulted in increased FTC scrutiny. Specifically, the membership agreements are considered unlawful restraints of trade by the FTC.¹⁶⁹

The FTC recently filed complaints against MLS companies in Bellingham, Washington; Virginia Beach, Virginia; and Puget Sound, Washington. All three complaints were resolved through consent decrees. The FTC alleged that the MLS companies engaged in a variety of restrictive practices to include bans on soliciting sellers with existing MLS listings, mandatory commission splits between listing and selling agents, minimum commission "guidelines," refusals to accept conditional

listings, and bans on exclusive agency or reserve clause listings.

The listed practices have the effect of limiting a home seller's bargaining power with an MLS-affiliated real estate agency. Often, home sellers would like to retain either the right to sell their own home without paying a broker's commission—by signing an exclusive agency listing instead of an exclusive right to sell listing—or the right to sell to specified prospective buyers identified before listing the property—by signing a reserve clause. Similarly, with the increase in competition among real estate agents, sellers are often in a position to bargain over the sales commission. Commissions typically are six to seven percent for residential home sales in most areas of the country. With the average price of a home exceeding \$130,000, each commission percentage point reduction saves the average seller \$1300 in closing costs. Sellers should be cautioned that commissions are listed in most MLS books along with the property description, and real estate agents naturally may be less inclined to show a home carrying a commission lower than the market's prevailing commission.

Legal assistance attorneys should monitor MLS practices in their areas. Unfair and unlawful restraints of trade of the types described above should be reported either to the Federal Trade Commission, 6th Street and Pennsylvania Ave. NW, Washington, DC 20580, or to the nearest regional FTC office. Major Gsteiger.

Estate Planning Note

Will Drafting for American Samoa Domiciliaries

In the past, legal assistance attorneys have had few resources to consult when asked to provide wills for domiciliaries of American territories such as American Samoa. In an attempt to fill this void, this note will provide a general overview of the statutory provisions relating to will drafting for these domiciliaries.

American Samoa law provides that any person of "full age"¹⁷⁰ and sound mind may dispose of property by will.¹⁷¹ Wills disposing of property exceeding \$300 must be in writing and signed by the testator.¹⁷² At least two witnesses must attest to the testator's signature.¹⁷³ American Samoa law has no provision for a self-proving affi-

¹⁶⁸The telephone number and address of the nearest office can be obtained by calling the National Committee for Employer Support of the Guard and Reserve, toll-free, at 1-800-336-4590 or autovon 226-1400.

¹⁶⁹See generally, TJAGSA Practice Note, *Restraint of Competition by Multiple Listing Service*, The Army Lawyer, August 1984, at 38.

¹⁷⁰The age of majority for American Samoa citizens is 18 years. Am. Samoa Stat. Ann. § 40.0401 (1979).

¹⁷¹*Id.* § 40.0101.

¹⁷²*Id.* § 40.0102.

¹⁷³*Id.*

davit. Accordingly, legal assistance attorneys should use the self-proving affidavit and statutory formalities of the state of execution when completing wills for American Samoan domiciliaries.

The American Samoan's freedom to dispose of property by will is not unlimited. Section 40.0103 of American Samoa Statutes provides a statutory right of dower to one-third of a decedent spouse's real or personal property.¹⁷⁴ A surviving spouse may elect to take a dower interest instead of property bequeathed or devised in the will.¹⁷⁵

The intestate succession scheme of American Samoa is not unlike that of many American states. Personal property not disposed of by will passes to the children of a decedent subject to the dower interest of any surviving spouse and after the payment of debts.¹⁷⁶ If no children exist, the surviving spouse inherits the entire estate of an American Samoan decedent. Real property passes under American Samoa intestate law to the decedent's issue, subject to the dower rights of any surviving spouse. If no linear descendants exist, real property passes to brothers and sisters, and if none survive, the real property passes to the father of the decedent.¹⁷⁷

American Samoa law provides that a personal representative must be at least twenty-one years old and a resident of American Samoa.¹⁷⁸ If no person is named in the will, the statutory priority specified under law is to the surviving spouse, next of kin in order of degree of relationship, and last, to a competent creditor.¹⁷⁹ Execu-

tors or administrators are allowed a commission not to exceed two and one-half percent upon receipts, and two and one-half percent upon disbursements. Administrators and executors are required to post bond in an amount set forth by the High Court.¹⁸⁰

Guardianships may be appointed for the person or the property of children under the age of eighteen. Guardians must be at least twenty-one years old and residents of American Samoa.¹⁸¹ The High Court has the power to set bond for guardians, and guardians are allowed the same statutory commission as executors and administrators are allowed.

Although American Samoa law provides several unique twists not found in most American states, drafting wills for domiciliaries of this territory should not pose an insurmountable challenge for the legal assistance attorney. Drafters must, of course, take into account dower rights when an American Samoa domiciliary does not make provision for a spouse in the will. Fiduciaries appointed in the will instrument should be residents of American Samoa and, although not specifically addressed in the statute, a testator apparently can specify that the court waive bond for fiduciaries.

The normal formalities for executing wills should be followed for the wills of American Samoa domiciliaries, using the self-proving affidavit of the place of execution with appropriate modifications. If the will is to be executed abroad, attorneys should use the attestation, acknowledgment,¹⁸² and self-proving affi-

¹⁷⁴Burns Philip Co. v. APO Fiamē, Faleal'fi, 2 Am. Samoa 2d 39 (1985).

¹⁷⁵Am. Samoa Code Ann. § 40.0105 (1982). Samoan law provides, however, that dower rights do not apply to communal property "held under the Samoan custom." *Id.* § 40.0106.

¹⁷⁶*Id.* § 40.0201.

¹⁷⁷*Id.* § 40.0202.

¹⁷⁸*Id.* § 40.0306.

¹⁷⁹*Id.* § 40.0305.

¹⁸⁰*Id.* § 40.0310.

¹⁸¹*Id.* § 40.0403.

¹⁸²The Uniform Probate Code, 8 Unif. L. Ann. § 2-504 (1990), provides the following attestation and acknowledgement clauses:

I, _____, the testator, sign my name to this instrument this _____ day of _____, 19____, and being first duly sworn, do hereby declare to the undersigned authority that I sign and execute this instrument as my last will and that I sign it willingly [or willingly direct another to sign for me], that I execute it as my free and voluntary act for the purposes therein expressed, and that I am eighteen years of age or older, of sound mind, and under no constraint or undue influence.

Testator

We, _____, and _____, the witnesses, sign our names to this instrument, being first duly sworn, and do hereby declare to the undersigned authority that the testator signs and executes this instrument as his [or her] last will and that he [or she] signs it willingly [or willingly directs another to sign for him], and that each of us, in the presence and hearing of the testator, hereby signs this will as witness to the testator's signing, and that to the best of our knowledge the testator is eighteen years of age or older, of sound mind, and under no constraint or undue influence.

Witness

Witness

Subscribed, sworn to and acknowledged before me _____, by the testator, and subscribed and sworn to before me by _____, and _____, witnesses, this _____ day of _____

(Signed) _____

(official capacity)

davit¹⁸³ provided by the Uniform Probate Code. Major Ingold.

Soldiers' and Sailors' Civil Relief Act Note
The Soldiers' and Sailors' Civil Relief Act
Amendments of 1991

On March 18, 1991, President Bush signed the Soldiers' and Sailors' Civil Relief Act (SSCRA) Amendments of 1991.¹⁸⁴ These amendments contain both substantive and procedural changes that improve and clarify the protections provided by the SSCRA.¹⁸⁵ While they do not resolve several recurring problems¹⁸⁶—and, for the most part, are limited to the Operations Desert Shield and Desert Storm time frame—they nevertheless are useful to many service members. The following is a section-by-section synopsis of the provisions that deal only with the SSCRA.

Eviction and Distress During Military Service

The amendments rejuvenated the provision affording protection from eviction. Section 530 of title 50, United States Code Appendix, now has a rent ceiling of \$1200,¹⁸⁷ up from \$150 where it had been since 1966. Consequently, if (1) military service is affecting the ability to pay rent, (2) the premises are rented by a service member or his or her dependents, and (3) the monthly

rent does not exceed \$1200, eviction may be stayed for up to three months. This provision is retroactive and applies to evictions commenced after July 31, 1990.

Extension of Power of Attorney Protection

The amendments reactivated section 591 of the SSCRA to extend certain powers of attorney executed by service members who are determined missing in action.¹⁸⁸ Section 591 provides an automatic extension of a power of attorney for the period a service member is missing if it (1) was executed by a person in the military service who is later missing; (2) designates a spouse, parent, or other named relative to be the attorney-in-fact; and (3) expires by its own terms after the person entered a missing status. This protection is extended to powers of attorney executed after July 31, 1990.

If a power of attorney is executed after the effective date of the SSCRA Amendments of 1991, however, and "by its terms clearly indicates that the power granted expires on the date specified,"¹⁸⁹ then this provision probably will not act to extend the power of attorney. The language of the statute indicates that when a service member intends a power of attorney to have a finite length while the section 591 automatic extension provision is in effect, then the service member's wishes must be respected.

¹⁸³The following self-proving affidavit is contained in the Uniform Probate Code, 8 Unif. L. Ann. § 2-504 (1990):

State of _____

County of _____

We _____, and _____, the testator and the witnesses, respectively, whose names are signed to the attached or foregoing instrument, being first duly sworn, do hereby declare to the undersigned authority that the testator signed and executed the instrument as his last will and that he had signed willingly [or willingly directed another to sign for him], and that he executed it as his free and voluntary act for the purposes therein expressed, and that each of the witnesses, in the presence and hearing of the testator, signed the will as his witnesses and that to the best of his knowledge the testator was at the time eighteen years of age or older, of sound mind and under no constraint or undue influence.

Testator

Witness

Witness

Subscribed, sworn to and acknowledged before me by _____, the testator, and subscribed and sworn to before me by _____, and _____, witnesses, this _____ day of _____

(Signed) _____

(official capacity)

¹⁸⁴Pub. L. No. 102-12, — Stat. — (1991) [hereinafter SSCRA Amendments of 1991].

¹⁸⁵50 U.S.C. App. §§ 501-548, 560-591 (1988). Sections 5 and 8 of the SSCRA Amendments of 1991 deal with health insurance protection and veterans' reemployment rights. They also amend 38 U.S.C. § 2021 and § 2024. These amendments are beyond the scope of this note.

¹⁸⁶For example, the very serious problem of inadvertently making an appearance for purposes of personal jurisdiction remains. The majority of courts recognize that a letter or motion by an absent service member requesting a stay pursuant to 50 U.S.C. App. § 521 is insufficient to provide personal jurisdiction that a proceeding otherwise lacks. Some courts, however, have taken a more draconian approach and have concluded that such a communication—even if limited to the purpose of requesting a stay—provides personal jurisdiction over an absent service member. *See, e.g., Skates v. Stockton*, 140 Ariz. 505, 683 P.2d 304 (Ct. App. 1984).

¹⁸⁷SSCRA Amendments of 1991 § 2.

¹⁸⁸*Id.* § 3.

¹⁸⁹50 U.S.C. App. § 591(b).

Professional Liability Protection for Certain Persons Ordered to Active Duty in the Armed Forces

This is an important new section in article VII of the SSCRA and likely will be codified at section 592.¹⁹⁰ This provision is intended to ensure that professionals who have suspended their civilian practice during military service will not suffer from financial inability to maintain insurance coverage for preservice practice. Many carriers require ongoing premium payments, even after practice has ended, to maintain coverage against claims that subsequently might be filed. In some instances, military salaries of health care providers may be less than their annual malpractice premiums.

Under this provision, health care providers and others furnishing "services determined by the Secretary of Defense to be professional services" will be eligible to apply to have their liability insurance policies suspended during periods of active service. Based on the breadth of language used, if the Secretary of Defense so chooses, Reserve component attorneys and other nonmedical professionals may receive protection. To qualify, designated professionals: (1) must have been ordered to active duty after July 31, 1990; and (2) must have had professional liability insurance in effect before beginning active duty.

Under this provision, liability insurance carriers may not charge designated professionals premiums during active service. Carriers must either refund any premiums paid for future coverage or credit the premiums toward payment of premiums after active service ends.

An important requirement to note is the procedure for reinstating liability coverage. After active service, professionals will have thirty days to request reinstatement of insurance. A liability insurance carrier must reinstate coverage as of the date a professional transmits his or her written request to the insurer. The minimum period of reinstatement will be the period remaining on the policy when the practitioner entered active service. Carriers may not increase premiums upon return to practice, except for general increases in premiums charged for coverage of other persons in the specialty.

This provision also provides a stay of a civil action against a professional while insurance coverage is suspended if: (1) the action is commenced during the period of suspension; (2) the action is based on an incident occurring before the date the suspension became effective; and (3) the insurance will otherwise cover the alleged malpractice.

If an action is stayed, it will be deemed filed on the date the insurance is reinstated. The statute of limitations will not run during the period of suspended insurance coverage. If the professional dies while coverage is suspended, the suspension will end upon death and the insurance carrier will be liable for malpractice claims to the same extent if the professional had lived.

Stay of Judicial Proceedings

The amendments also expanded until June 30, 1991, the opportunity for service members to stay judicial proceedings in which they are plaintiffs or defendants.¹⁹¹ Unlike the section 521 stay,¹⁹² this new provision does not require a showing of material effect. Instead, a stay is appropriate when: (1) requested by someone on active duty or someone representing an active duty service member; and (2) the service member is serving outside the state in which the action is located. If these requirements are met, the court must stay the action at any stage before final judgment.

This provision has limited duration. Any stay entered will remain effective only until June 30, 1991. Additionally, the provision does not remedy the ongoing problem of inadvertently providing personal jurisdiction when requesting a stay.

Exercise of Rights Under Act Not to Affect Certain Future Financial Transactions

This is another new section in article I of the SSCRA and likely will be codified at section 518.¹⁹³ It prohibits retaliatory action against individuals who invoke the SSCRA. Under this amendment, an application under the provisions of the SSCRA for a stay; postponement; or suspension of any tax, fine, penalty, insurance premium, or other *civil obligation or liability* cannot be the basis for certain actions.¹⁹⁴ Specifically, lenders cannot conclude that because a service member used such a provision of the SSCRA, the service member necessarily must be unable to meet the affected obligation or liability.

With respect to credit transactions between service members and creditors, creditors cannot respond by denying or revoking credit, changing the terms of an existing credit arrangement, refusing to grant credit in the terms requested, or submitting adverse credit reports to credit reporting agencies. If a service member is dealing with an insurer, the insurer cannot respond by refusing to insure the service member.

¹⁹⁰SSCRA Amendments of 1991 § 4.

¹⁹¹*Id.* § 6.

¹⁹²Under 50 U.S.C. App. § 521, the court must enter a stay unless military service materially is not affecting a service member's ability to defend or prosecute an action.

¹⁹³SSCRA Amendments of 1991 § 7.

¹⁹⁴*Id.* (emphasis added).

This amendment should be broad enough to apply to the service member's exercising rights under section 526, which limits interest to six percent, because section 526 arguably suspends the obligation to pay interest in excess of six percent.

Technical Amendments to SSCRA of 1940

These amendments make no substantive changes, but clarify areas of confusion and uncertainty in the SSCRA.¹⁹⁵ Included is language making clear that members of the Air Force receive coverage. The technical amendments also substitute "reserve component of the Armed Forces" for "enlisted reserve corps" in section 516 and thereby extend protections under articles I, II, and III to all Reserve component service members upon their receiving orders to active duty. Upon reporting for active duty, these persons are then eligible for all SSCRA protections. Major Pottorff.

Family Law Notes

Army Amends Guidance on Implementing Department of Defense Directive 5525.9

Department of Defense (DOD) Directive 5525.9 requires the Army to cooperate with courts, as well as federal, state, and local officials, in enforcing certain court orders. These orders include child custody and support orders against soldiers, DOD civilian employees, and accompanying family members located overseas.¹⁹⁶ The orders also encompass situations in which the subject of the order has "been charged with, or convicted of, a felony."¹⁹⁷ On November 8, 1990, the Army issued its policy implementing DOD Directive 5525.9.¹⁹⁸ Concern over flaws in the policy, however, caused the Army to issue amendments to the policy on January 4, 1991.¹⁹⁹

The amendments make two particularly significant changes to the original policy. First, the amendments clarify that only soldiers can be returned forcibly to the United States upon the request of a civilian court.²⁰⁰ Second, the amendments require that all actions "whether to invoke the DOD Directive or not, must be reported promptly to ASD (FM&P) and General Counsel, Department of Defense."²⁰¹

The Army's amended policy for implementing DOD Directive 5525.9 will be published as part of Army Regulation 600-8-15. The new regulation was in final draft as

of 1 March 1991, and is expected to be published soon. Major Connor.

State-by-State Analysis of the Divisibility of Military Retired Pay

Revised 26 March 1991

On 30 May 1989, the United States Supreme Court announced its decision in *Mansell v. Mansell*.²⁰² In *Mansell* the Court ruled that states cannot divide the value of Department of Veterans' Affairs disability benefits that are received in lieu of military retired pay. The Court's decision also strongly suggests that states are limited to dividing disposable retired pay,²⁰³ and that they have no authority to divide the gross amount of military retired pay. When using the following materials, practitioners must remember that *Mansell* overruled case law in a number of states.

Alabama

Not divisible as marital property. *Tinsley v. Tinsley*, 431 So. 2d 1304, 1307 (Ala. Civ. App. 1983) (military pay is not divisible as marital property) (citing *Pedigo v. Pedigo*, 413 So. 2d 1154 (Ala. Civ. App. 1981)); *Kabaci v. Kabaci*, 373 So. 2d 1144 (Ala. Civ. App. 1979). *But see Underwood v. Underwood*, 491 So. 2d 242 (Ala. Civ. App. 1986) (wife awarded alimony from husband's military disability retired pay); *Phillips v. Phillips*, 489 So. 2d 592 (Ala. Civ. App. 1986) (wife awarded 50% of husband's gross military pay as alimony).

Alaska

Divisible. *Chase v. Chase*, 662 P.2d 944 (Alaska 1983) (overruling *Cose v. Cose*, 592 P.2d 1230 (Alaska 1979), *cert. denied*, 453 U.S. 922 (1982)). Nonvested retirement benefits are divisible. *Laing v. Laing*, 741 P.2d 649 (Alaska 1987). *See also Morlan v. Morlan*, 720 P.2d 497 (Alaska 1986) In *Morlan* the trial court ordered a civilian employee to retire to ensure the spouse received her share of a pension. The pension would be suspended if the employee continued working. On appeal, the court held that the employee should have been given the option of continuing to work and periodically paying the spouse the sums she would have received from the retired pay. In reaching this result, the court cited the California *Gillmore* decision.

¹⁹⁵ *Id.* § 9.

¹⁹⁶ *See* 32 C.F.R. pt. 146 (1990).

¹⁹⁷ "[A] criminal offense that is punishable by incarceration for more than 1 year, regardless of the sentence that is imposed for commission of that offense." *Id.* § 146.3.

¹⁹⁸ 55 Fed. Reg. 47042 (1990) (to be codified at 32 C.F.R. Part 589); *see also* TJAGSA Practice Note, *Army Implementation of Department of Defense Directive 5525.9*, *The Army Lawyer*, Feb. 1991, at 94.

¹⁹⁹ 56 Fed. Reg. 370 (1991).

²⁰⁰ *Id.* at 371 (to be codified at 32 C.F.R. § 589.4(b)).

²⁰¹ *Id.* (to be codified at 32 C.F.R. § 589(b)(6)).

²⁰² 490 U.S. 581 (1989).

²⁰³ *See* 10 U.S.C. § 1408(a)(4) (1988).

Arizona

Divisible. *DeGryse v. DeGryse*, 135 Ariz. 335, 661 P.2d 185 (Ariz. 1983); *Edsall v. Superior Court of Arizona*, 143 Ariz. 240, 693 P.2d 895 (Ariz. 1984); *Van Loan v. Van Loan*, 116 Ariz. 272, 569 P.2d 214 (1977) (a non-vested military pension is community property). A civilian retirement plan case, *Koelsch v. Koelsch*, 148 Ariz. 176, 713 P.2d 1234 (Ariz. 1986), held that if the employee is not eligible to retire at the time of the dissolution, the court *must* order that the spouse begin receiving the awarded share of retired pay when the employee becomes *eligible* to retire, whether or not he or she does retire at that point.

Arkansas

Divisible. *Young v. Young*, 288 Ark. 33, 701 S.W.2d 369 (1986). *But see Durham v. Durham*, 289 Ark. 3, 708 S.W.2d 618 (1986) (military retired pay not divisible where the member had not served 20 years at the time of the divorce, and therefore the military pension had not "vested").

California

Divisible. *In re Fithian*, 10 Cal. 3d 592, 517 P.2d 449, 111 Cal. Rptr. 369 (1974); *In re Hopkins*, 142 Cal. App. 3d 350, 191 Cal. Rptr. 70 (1983). A non-resident service member did not waive his right under the Uniformed Services Former Spouses Protection Act (USFSPA) to object to California's jurisdiction over his military pension by consenting to the court's jurisdiction over other marital and property issues. *Tucker v. Tucker*, 17 Fam. L. Rep. (BNA) 1173 (Cal. Ct. App. Jan 15, 1991). Non-vested pensions are divisible. *In re Brown*, 15 Cal. 3d 838, 544 P.2d 561, 126 Cal. Rptr. 633 (1976). *In re Mansell*, 265 Cal. Rptr. 227 (Cal. App. 1989) (on remand from *Mansell v. Mansell*, 490 U.S. 581 (1989)). In *Mansell*, the court held that gross retired pay was divisible because it was based on a stipulated property settlement to which *res judicata* had attached. *Id.* State law has held that military disability retired pay is divisible to the extent it replaces what the retiree would have received as longevity retired pay. *In re Mastropaolo*, 166 Cal. App. 3d 953, 213 Cal. Rptr. 26 (1985); *In re Mueller*, 70 Cal. App. 3d 66, 137 Cal. Rptr. 129 (1977). The *Mansell* case, however, raises doubt about the continued validity of this proposition. If the member is not retired at the time of the dissolution, the spouse can elect to begin receiving the awarded share of "retired pay" when the member becomes *eligible* to retire, or anytime thereafter, even if the member remains on active duty. *In re Luciano*, 104 Cal. App. 3d 956, 164 Cal. Rptr. 93 (1980); *see also In re Gillmore*, 29 Cal. 3d 418, 629 P.2d 1, 174 Cal. Rptr. 493 (1981) (same principle applied to a civilian pension plan).

Colorado

Divisible. *Gallo v. Gallo*, 752 P.2d 47 (Colo. 1988) (vested military retired pay is marital property); *see also In re*

Grubb, 745 P.2d 661 (Colo. 1987) (vested but unmatured civilian retirement benefits are marital property). *Grubb* expressly overruled any contrary language in *Ellis v. Ellis*, 191 Colo. 317, 552 P.2d 506 (1976). *See In re Nelson*, 746 P.2d 1346 (Colo. 1987) (applying *Grubb* in a case involving vested contingent pension benefits when contingency was that the employee must survive to retirement age). The *Gallo* decision will not be applied retroactively, however. *In re Wolford*, 709 P.2d 454 (Colo. Ct. App. 1989). Note that notwithstanding language in the case law, some practitioners in Colorado Springs have reported that local judges divide military retired pay, or reserve jurisdiction on the issue, even if the member has not served for twenty years at the time of the divorce.

Connecticut

Probably divisible. Conn. Gen. Stat. § 46b-81 (1986) (giving courts broad power to divide property). *See Thompson v. Thompson*, 183 Conn. 96, 438 A.2d 839 (1981) (nonvested civilian pension is divisible).

Delaware

Divisible. *Smith v. Smith*, 458 A.2d 711 (Del. Fam. Ct. 1983). Nonvested pensions are divisible; *Donald R.R. v. Barbara S.R.*, 454 A.2d 1295 (Del. Sup. Ct. 1982).

District of Columbia

Probably divisible. *See Barbour v. Barbour*, 464 A.2d 915 (D.C. 1983) (vested but unmatured civil service pension held divisible; dicta suggests that nonvested pensions also are divisible).

Florida

Divisible. As of October 1, 1988, all vested and non-vested pension plans are treated as marital property to the extent that they are accrued during the marriage. Fla. Stat. § 61.075(3)(a)4 (1988); *see also* 1988 Fla. Sess. Law Serv. 342, at § 3(1). These legislative changes appear to overrule the prior limitation in *Pastore v. Pastore*, 497 So. 2d 635 (Fla. 1986) (only vested military retired pay can be divided).

Georgia

Probably divisible. *Cf. Courtney v. Courtney*, 256 Ga. 97, 344 S.E.2d 421 (1986) (nonvested civilian pensions are divisible); *Stumpf v. Stumpf*, 249 Ga. 759, 294 S.E.2d 488 (1982) (military retired pay may be considered in establishing alimony obligations); *Holler v. Holler*, 257 Ga. 27, 354 S.E.2d 140 (1987). In *Holler* the court, citing *Stumpf* and *Courtney*, "[a]ssum[ed] that vested and non-vested military retirement benefits acquired during the marriage are now marital property subject to equitable division." *Id.* The court then decided that military retired pay could not be divided retroactively if it was not subject to division at the time of the divorce. *Id.*

Hawaii

Divisible. *Linson v. Linson*, 1 Haw. App. 272, 618 P.2d 748 (1981); *Cassiday v. Cassiday*, 716 P.2d 1133 (Haw. 1986). In *Wallace v. Wallace*, 5 Haw. App. 55, 677 P.2d 966 (1984), the court ordered an employee of the Public Health Service, which is covered by the USFSPA, to pay a share of retired pay upon reaching retirement age, whether or not he retires at that point. He argued that the ruling amounted to an order to retire, violating 10 U.S.C. section 1408(c)(3), but the court affirmed the order. In *Jones v. Jones*, 780 P.2d 581 (Haw. Ct. App. 1989), the court ruled that *Mansell's* limitation on dividing Veterans' Administration (VA) benefits cannot be circumvented by awarding an offsetting interest in other property. It also held that *Mansell* applies to military disability retired pay, as well as to VA benefits. *Id.*

Idaho

Divisible. *Ramsey v. Ramsey*, 96 Idaho 672, 535 P.2d 53 (1975) (reinstated by *Griggs v. Griggs*, 197 Idaho 123, 686 P.2d 68 (1984)). Courts cannot circumvent *Mansell's* limitation on dividing VA benefits by using an offset against other property. *Bewley v. Bewley*, 780 P.2d 596 (Idaho Ct. App. 1989).

Illinois

Divisible. *In re Dooley*, 137 Ill. App. 3d 407, 484 N.E.2d 894 (1985); *In re Korper*, 131 Ill. App. 3d 753, 475 N.E.2d 1333 (1985). *Korper* points out that under Illinois law a pension is marital property even if it is not vested. In *Korper* the member had not yet retired and he objected to the spouse getting the cash-out value of her interest in retired pay. He argued that the USFSPA allowed division only of "disposable retired pay" and that state courts therefore are preempted from awarding the spouse anything before retirement. The court rejected this argument, thereby raising the unaddressed question whether a spouse could be awarded a share of "retired" pay at the time the member becomes eligible for retirement—even if he or she does not retire at that point. See *In re Luciano*, 104 Cal. App. 3d 956, 164 Cal. Rptr. 93 (1980) (applying such a rule); see also Ill. Stat. Ann. ch. 40, para. 510.1 (Smith-Hurd Supp. 1988) (allowing modification of agreements and judgments that became final between 25 June 1981, and 1 February 1983, unless the party opposing modification shows that the original disposition of military retired pay was appropriate).

Indiana

Divisible. Indiana Code § 31-1-11.5-2(d)(3) (1987) (amended in 1985 to provide that "property" for marital dissolution purposes includes, *inter alia*, "[t]he right to receive disposable retired pay, as defined in 10 U.S.C. § 1408(a), acquired during the marriage, that is or may be payable after the dissolution of the marriage"). The right to receive retired pay must be vested as of the date the

divorce petition for the spouse to be entitled to a share. *Kirkman v. Kirkman*, 555 N.E.2d 1293 (Ind. 1990). Courts, however, should consider the nonvested military retired benefits in adjudging a just and reasonable division of property. *In re Bickel*, 533 N.E.2d 593 (Ind. Ct. App. 1989); *Arthur v. Arthur*, 519 N.E.2d 230 (Ind. Ct. App. 1988) (Second District ruled that Indiana Code § 31-1-11.5-2(d)(3) cannot be applied retroactively to allow division of military retired pay in a case filed before the law's effective date, which was 1 September 1985). But see *Sable v. Sable*, 506 N.E.2d 495 (Ind. Ct. App. 1987) (Third District ruled that Indiana Code § 31-1-11.5-2(d)(3) can be applied retroactively).

Iowa

Divisible. *In re Howell*, 434 N.W.2d 629 (Iowa 1989). The member already had retired in this case, but the decision may be broad enough to encompass nonvested retired pay as well. The court also ruled that disability payments from the VA, paid in lieu of a portion of military retired pay, are not marital property. Finally, the court apparently intended to award the spouse a percentage of gross military retired pay, but it actually "direct[ed] that 30.5% of [the husband's] disposable retired pay, except disability benefits, be assigned to [the wife] in accordance with section 1408 of Title 10 of the United States Code." (emphasis added). *Id.* *Mansell* may have overruled the court's holding that it has authority to divide gross retired pay.

Kansas

Divisible. Kan. Stat. Ann. § 23-201(b) (1987), (effective July 1, 1987, vested and nonvested military pensions are now marital property); *In re Harrison*, 13 Kan. App. 2d 313, 769 P.2d 678 (1989) (applying the statute and holding that it overruled the previous case law that prohibited division of military retired pay).

Kentucky

Divisible. *Jones v. Jones*, 680 S.W.2d 921 (Ky. 1984); *Poe v. Poe*, 711 S.W.2d 849 (Ky. Ct. App. 1986) (military retirement benefits are marital property even before they "vest"); see Kentucky H.R. 680 (amending Ky. Rev. Stat. Ann. § 403.190 (Michie/Bobbs-Merrill 1986), which expressly defines marital property to include retirement benefits).

Louisiana

Divisible. *Swope v. Mitchell*, 324 So. 2d 461 (La. 1975); *Little v. Little*, 513 So. 2d 464 (La. Ct. App. 1987) (nonvested and unmatured military retired pay is marital property); *Jett v. Jett*, 449 So. 2d 557 (La. Ct. App. 1984); *Rohring v. Rohring*, 441 So. 2d 485 (La. Ct. App. 1983); see also *Campbell v. Campbell*, 474 So.2d 1339 (Ct. App. La. 1985) (a court can award a spouse a share of disposable retired pay—not gross retired pay—and divide VA

disability benefits paid in lieu of military retired pay). This approach conforms to the dicta in the *Mansell* concerning divisibility of gross retired pay.

Maine

Divisible. *Lunt v. Lunt*, 522 A.2d 1317 (Me. 1987). See also Me. Rev. Stat. Ann. tit. 19, § 22-A(6) (1989) (providing that the parties become tenants-in-common regarding property that a court fails to divide or to set apart).

Maryland

Divisible. *Nisos v. Nisos*, 60 Md. App. 368, 483 A.2d 97 (1984) (applying Md. Fam. Law Code Ann. § 8-203(b), which provides that military pensions are to be treated the same as other pension benefits). Such benefits are marital property under Maryland law. See *Deering v. Deering*, 292 Md. 115, 437 A.2d 883 (1981); see also *Ohm v. Ohm*, 49 Md. App. 392, 431 A.2d 1371 (1981) (non-vested pensions are divisible). "Window decrees" that are silent on division of retired pay cannot be reopened simply on the basis that Congress subsequently enacted the USFSPA. *Andresen v. Andresen*, 317 Md. 380, 564 A.2d 399 (1989).

Massachusetts

Divisible. *Andrews v. Andrews*, 27 Mass. App. 759, 543 N.E.2d 31 (1989). In *Andrews* the spouse was awarded alimony from military retired pay and she appealed, seeking a property interest in the pension. The trial court's ruling was upheld, but the appellate court noted that "the judge could have assigned a portion of the pension to the wife" as property. *Id.*

Michigan

Divisible. *Keen v. Keen*, 160 Mich. App. 314, 407 N.W.2d 643 (1987); *Giesen v. Giesen*, 140 Mich. App. 335, 364 N.W.2d 327 (1985); *McGinn v. McGinn*, 126 Mich. App. 689, 337 N.W.2d 632 (1983); *Chisnell v. Chisnell*, 82 Mich. App. 699, 267 N.W.2d 155 (1978); see also *Boyd v. Boyd*, 116 Mich. App. 774, 323 N.W.2d 553 (1982) (only vested pensions are divisible).

Minnesota

Divisible. *Deliduka v. Deliduka*, 347 N.W.2d 52 (Minn. Ct. App. 1984). This case also holds that a court may award a spouse a share of gross retired pay. That portion of the decision may have been overruled by *Mansell*. See also *Janssen v. Janssen*, 331 N.W.2d 752 (Minn. 1983) (nonvested pensions are divisible).

Mississippi

Divisible. *Powers v. Powers*, 465 So. 2d 1036 (Miss. 1985).

Missouri

Divisible. Only disposable retired pay is divisible. *Moon v. Moon*, 795 S.W.2d 511 (Mo. Ct. App. 1990). *Fairchild v. Fairchild*, 747 S.W.2d 641 (Mo. Ct. App. 1988) (non-vested and nonmatured military retired pay are marital property); *Coates v. Coates*, 650 S.W.2d 307 (Mo. Ct. App. 1983).

Montana

Divisible. *In re Marriage of Kecskes*, 210 Mont. 479, 683 P.2d 478 (1984); *In re Miller*, 37 Mont. 556, 609 P.2d 1185 (1980), vacated and remanded sub. nom. *Miller v. Miller*, 453 U.S. 918 (1981).

Nebraska

Divisible. *Taylor v. Taylor*, 348 N.W.2d 887 (Neb. 1984); Neb. Rev. Stat. § 42-366 (1989) (pensions and retirement plans are part of the marital estate).

Nevada

Probably divisible. *Tomlinson v. Tomlinson*, 729 P.2d 1303 (Nev. 1986) (speaking approvingly of the USFSPA in dicta, but declining to divide retired pay in this case because it involved a final decree from another state). *Tomlinson* was legislatively reversed by the Nevada Former Military Spouses Protection Act (NFMSPA), Nev. Rev. Stat. § 125.161 (1987) (military retired pay can be partitioned even if the decree is silent on division and even if it is foreign). The NFMSPA has been repealed, however, effective March 20, 1989. See Nevada S.11, 1989 Nev. Stat. 34. The Nevada Supreme Court subsequently has ruled that the doctrine of *res judicata* bars partitioning military retired pay when "the property settlement has become a judgment of the court." See *Taylor v. Taylor*, 775 P.2d 703 (Nev. 1989). Nonvested pensions are community property. *Gemma v. Gemma*, 778 P.2d 429 (Nev. 1989). The spouse has the right to elect to receive his or her share when the employee spouse becomes retirement eligible, whether or not retirement occurs at that point. *Id.*

New Hampshire

Divisible. N.H. Rev. Stat. Ann. § 458:16-a (1987) (effective Jan 1, 1988):

Property shall include all tangible and intangible property and assets ... belonging to either or both parties, whether title to the property is held in the name of either or both parties. Intangible property includes ... employment benefits, [and] vested and non-vested pensions or other retirement plans... [T]he court may order an equitable division of property between the parties. The court shall presume that an equal division is an equitable distribution.

This provision was relied on by the New Hampshire Supreme Court in *Blanchard v. Blanchard*, 578 A.2d 339 (N.H. 1990), when it overruled *Baker v. Baker*, 120 N.H. 645, 421 A.2d 998 (1980) (military retired pay not divisible as marital property, but it may be considered "as a relevant factor in making equitable support orders and property distributions").

New Jersey

Divisible. *Castiglioni v. Castiglioni*, 192 N.J. Super. 594, 471 A.2d 809 (N.J. 1984); *Whitfield v. Whitfield*, 222 N.J. Super. 36, 535 A.2d 986 (N.J. Super. Ct. App. Div. 1987) (nonvested military retired pay is marital property); *Kruger v. Kruger*, 139 N.J. Super. 413, 354 A.2d 340 (N.J. Super. Ct. App. Div. 1976), *aff'd*, 73 N.J. 464, 375 A.2d 659 (1977). Post-divorce cost-of-living raises are divisible. *See Moore v. Moore*, 553 A.2d 20 (N.J. 1989) (police pension).

New Mexico

Divisible. *Walentowski v. Walentowski*, 100 N.M. 484, 672 P.2d 657 (N.M. 1983); *Stroshine v. Stroshine*, 98 N.M. 742, 652 P.2d 1193 (N.M. 1982); *LeClert v. LeClert*, 80 N.M. 235, 453 P.2d 755 (1969); *see also White v. White*, 105 N.M. 800, 734 P.2d 1283 (N.M. Ct. App. 1987) (a court can award a spouse a share of gross retired pay). *Mansell* may have overruled this decision. In *Mattox v. Mattox*, 105 N.M. 479, 734 P.2d 259 (N.M. Ct. App. 1987), a case involving two civilians, the court cited the California *Gillmore* case approvingly, suggesting that a court can order a member to begin paying the spouse his or her share when the member becomes eligible to retire, even if the member elects to remain in active duty.

New York

Divisible. Pensions in general are divisible; *Majauskas v. Majauskas*, 61 N.Y.2d 481, 463 N.E.2d 15, 474 N.Y.S.2d 699 (1984). Most lower courts hold that nonvested pensions are divisible. *See, e.g., Damiano v. Damiano*, 94 A.D.2d 132, 463 N.Y.S.2d 477 (N.Y. App. Div. 1983). Case law seems to treat military retired pay as subject to division. *See, e.g., Lydick v. Lydick*, 130 A.D.2d 915, 516 N.Y.S.2d 326 (N.Y. App. Div. 1987); *Gannon v. Gannon*, 116 A.D.2d 1030, 498 N.Y.S.2d 647 (N.Y. App. Div. 1986). Disability payments are separate property as a matter of law, but a disability pension is marital property to the extent it reflects deferred compensation. *See West v. West*, 101 A.D.2d 834, 475 N.Y.S.2d 493 (N.Y. App. Div. 1984). In *McDermott v. McDermott*, 474 N.Y.S.2d 221, 225 (N.Y. Sup. Ct. 1984), a civilian case, the court ruled that it can "limit the employee spouse's choice of pension options or designation of beneficiary where necessary, to preserve the non-employee spouse's interest." *McDermott* suggests that New York courts can order a member to elect survivor benefits plan protection for a former spouse.

North Carolina

Divisible. N.C. Gen. Stat. § 50-20(b) (1988), expressly declares vested military pensions to be marital property. In *Seifert v. Seifert*, 82 N.C. App. 329, 346 S.E.2d 504 (1986), *aff'd on other grounds*, 319 N.C. 367, 354 S.E.2d 506 (1987), the court suggested that vesting occurs when officers serve for twenty years, but not until enlisted personnel serve for thirty years. In *Milam v. Milam*, 92 N.C. App. 105, 373 S.E.2d 459 (1988), however, the court ruled that a warrant officer's retired pay had "vested" when he reached the eighteen-year "lock-in" point. *See also Lewis v. Lewis*, 83 N.C. App. 438, 350 S.E.2d 587 (1986) (a court can award a spouse a share of gross retired pay, but because of the wording of the state statute, the amount cannot exceed 50% of the retiree's disposable retired pay). *Mansell* may have overruled the *Lewis* court's decision in part.

North Dakota

Divisible. *Delorey v. Delorey*, 357 N.W.2d 488 (N.D. 1984); *see also Morales v. Morales*, 402 N.W.2d 322 (N.D. 1987) (equitable factors can be considered in dividing military retired pay; therefore, 17.5% award to 17-year spouse is affirmed); *Bullock v. Bullock*, 354 N.W.2d 904 (N.D. 1984) (a court can award a spouse a share of gross retired pay). *Mansell* may have overruled *Bullock*.

Ohio

Divisible. *Anderson v. Anderson*, 468 N.E.2d 784, 13 Ohio App. 3d 194 (1984); *see also Lemon v. Lemon*, 42 Ohio App. 3d 142, 537 N.E.2d 246 (1988) (nonvested pensions are divisible as marital property).

Oklahoma

Divisible. *Stokes v. Stokes*, 738 P.2d 1346 (Okla. 1987) (based on a statute that became effective on 1 June 1987). The state Attorney General had earlier opined that military retired pay was divisible, based on the prior law.

Oregon

Divisible. *In re Manners*, 68 Or. App. 896, 683 P.2d 134 (1984); *In re Vinson*, 48 Or. App. 283, 616 P.2d 1180 (1980); *see also In re Richardson*, 307 Or. 370, 769 P.2d 179 (1989) (nonvested pension plans are marital property). The date of separation is the date used for classification as marital property.

Pennsylvania

Divisible. *Major v. Major*, 359 Pa. Super. 344, 518 A.2d 1267 (1986) (nonvested military retired pay is marital property).

Puerto Rico

Not divisible as marital property. *Delucca v. Colon*, No. 87-JTS-104 (P.R. Sept. 25, 1987). This case overruled

Torres-Reyes v. Robles-Estrada, 115 P.R. Dec. 765 (1984), which had held that military retired pay is divisible. Pensions, however, may be considered in setting child support and alimony obligations.

Rhode Island

Probably divisible. R.I. Pub. Laws § 15-5-16.1 (1988) gives courts very broad powers over the parties' property to effect an equitable distribution.

South Carolina

Divisible. *Martin v. Martin*, 373 S.E.2d 706 (S.C. Ct. App. 1988) (vested military retirement benefits are marital property). *Martin* also held that present cash value determination can be based on gross pension value, as opposed to net pension value. *Id.* The case is based on a 1987 amendment to state law. See S.C. Code § 20-7-471 (1987). But see *Walker v. Walker*, 368 S.E.2d 89 (S.C. Ct. App. 1988). In *Walker* the wife lived with parents during entire period of husband's naval service. Because she made no homemaker contributions, the court determined that she was not entitled to any portion of the military retired pay. *Id.*

South Dakota

Divisible. *Gibson v. Gibson*, 437 N.W.2d 170 (S.D. 1989) (stating that military retired pay is divisible). In *Gibson*, the court specifically considered the Reserve component retired pay of a member who had served twenty years, but had not yet reached age sixty. See *id.*; see also *Radigan v. Radigan*, 17 Fam. L. Rep. (BNA) 1202 (S.D. Sup. Ct. Jan. 23, 1991) (husband must share with ex-wife any increase in his retired benefits that results from his own, post divorce efforts); *Hautala v. Hautala*, 417 N.W.2d 879 (S.D. 1987) (trial court awarded spouse 42% of military retired pay, which was not challenged on appeal); *Moller v. Moller*, 356 N.W.2d 909 (S.D. 1984) (commenting approvingly on cases from other states that recognize divisibility, but declining to divide retired pay because a 1977 divorce decree was not appealed until 1983). See generally *Caughron v. Caughron*, 418 N.W.2d 791 (S.D. 1988) (the present cash value of a nonvested retirement benefit is marital property); *Hansen v. Hansen*, 273 N.W.2d 749 (S.D. 1979) (vested civilian pension is divisible); *Stubbe v. Stubbe*, 376 N.W.2d 807 (S.D. 1985) (civilian pension divisible). The *Stubbe* court observed that "this pension plan is vested in the sense that it cannot be unilaterally terminated by [the] employer, though actual receipt of benefits is contingent upon [the worker's] survival and no benefits will accrue to the estate prior to retirement." *Id.*

Tennessee

Divisible. Tenn. Code Ann. § 36-4-121(b)(1) (1988), defines all vested pensions as marital property. No

reported Tennessee cases specifically concern military pensions.

Texas

Divisible. *Cameron v. Cameron*, 641 S.W.2d 210 (Tex. 1982); see also *Grier v. Grier*, 731 S.W.2d 936 (Tex. 1987) (court can award a spouse a share of gross retired pay, but post-divorce pay increases constitute separate property). *Mansell* may have overruled *Grier* in part. Pensions need not be vested to be divisible. *Ex parte Burson*, 615 S.W.2d 192 (Tex. 1981), held that a court cannot divide VA disability benefits paid in lieu of military retired pay. This ruling is in accord with *Mansell*.

Utah

Divisible. *Greene v. Greene*, 751 P.2d 827 (Utah Ct. App. 1988). This case clarifies that nonvested pensions can be divided under Utah law, and in dicta it suggests that only disposable retired pay is divisible—not gross retired pay. But see *Maxwell v. Maxwell*, 796 P.2d 403 (Utah App. 1990) (because of a stipulation between the parties, the court ordered a military retiree to pay his ex-wife one-half the amount deducted from his retired pay for taxes).

Vermont

Probably divisible. Vt. Stat. Ann., tit. 15, § 751 (1988), provides:

The court shall settle the rights of the parties to their property by ... equit[able] divi[sion]. All property owed by either or both parties, however and whenever acquired, shall be subject to the jurisdiction of the court. Title to the property ... shall be immaterial, except where equitable distribution can be made without disturbing separate property.

Virginia

Divisible. Va. Ann. Code § 20-107.3 (1988), defines marital property to include all pensions, whether or not vested. See also *Mitchell v. Mitchell*, 4 Va. App. 113, 355 S.E.2d 18 (1987); *Sawyer v. Sawyer*, 1 Va. App. 75, 335 S.E.2d 277 (Va. Ct. App. 1985) (these cases hold that military retired pay is subject to equitable division).

Washington

Divisible. *Konzen v. Konzen*, 103 Wash. 2d 470, 693 P.2d 97, cert. denied, 473 U.S. 906 (1985); *Wilder v. Wilder*, 85 Wash. 2d 364, 534 P.2d 1355 (1975) (nonvested pension held to be divisible); *Payne v. Payne*, 82 Wash. 2d 573, 512 P.2d 736 (1973); *In re Smith*, 98 Wash. 2d 772, 657 P.2d 1383 (1983).

West Virginia

Divisible. *Butcher v. Butcher*, 357 S.E.2d 226 (W.Va. 1987) (vested and nonvested military retired pay is mari-

tal property subject to equitable distribution, and a court can award a spouse a share of gross retired pay). *Mansell* may have overruled *Butcher* in part.

Wisconsin

Divisible. *Thorpe v. Thorpe*, 123 Wis. 2d 424, 367 N.W.2d 233 (Wis. Ct. App. 1985); *Pfeil v. Pfeil*, 115 Wis. 2d 502, 341 N.W.2d 699 (Wis. Ct. App. 1983); see also *Leighton v. Leighton*, 81 Wis. 2d 620, 261 N.W.2d 457 (1978) (nonvested pension held to be divisible); *Rodak v. Rodak*, 150 Wis. 2d 624, 442 N.W.2d 489 (Wis. Ct. App. 1989) (portion of civilian pension that was earned before marriage is included in marital property and subject to division).

Wyoming

Divisible. *Parker v. Parker*, 750 P.2d 1313 (Wyo. 1988) (nonvested military retired pay is marital property).

Canal Zone

Divisible. *Bodenhorn v. Bodenhorn*, 567 F.2d 629 (5th Cir. 1978).

Major Connor.

Administrative and Civil Law Note

Settlement of Watkins v. United States

On January 26, 1991, settlement was reached in *Watkins v. United States*.²⁰⁴ Under the settlement, Perry Watkins received back pay and allowances, and was retired from the active Army in the pay grade of E-7 on February 1, 1991. He also received attorneys' fees to cover the costs associated with pursuing his case.

The settlement concluded ten years of litigation that stemmed from the Army's refusing to reenlist Watkins because of his homosexuality. Department of Defense policy declares homosexuality incompatible with military service.

The settlement also follows the Supreme Court's November 5, 1990, decision not to review the Ninth Circuit's en banc ruling in the case. The Ninth Circuit held that the Army was equitably estopped from denying Watkins reenlistment based upon his homosexuality. The

court found that prohibiting Watkins from reenlisting would be unfair because the Army, having knowledge of his homosexuality, previously had allowed him to reenlist. The court declined to address the constitutionality of the military's homosexual exclusion policy, which has been thus far upheld. Major Battles and Major Moore.

Contract Law Note

Changing Horses in Mid-Acquisition

In a recent decision,²⁰⁵ the United States Court of Appeals for the Eleventh Circuit held that a former Reserve officer's mere presence on behalf of a contractor at a "status conference" violated the conflict of interest statute.²⁰⁶ The status conference involved a contract on which the officer had worked while he was employed by the Air Force.

Colonel Eugene Schaltenbrand was convicted under section 207(a) of title 18, United States Code (U.S.C.),²⁰⁷ which prohibits former government employees from representing private parties before the government on matters in which they participated personally and substantially while employed by the government. Colonel Schaltenbrand also was convicted under 18 U.S.C. section 208(a),²⁰⁸ which prohibits government employees from working on projects in which they have a financial interest.

In 1987, the United States Air Force was engaged in a program to sell C-130 aircraft to friendly countries. Part of the program was to develop a system of maintenance and support for the aircraft through a private defense contractor. Colonel Schaltenbrand, a Reserve officer, was activated numerous times to assist on the project and was assigned to work exclusively on the Air Force's project with Mexico—the "Mexican Project." Teledyne Brown Engineering (TBE), a defense contractor, had been selected by the Mexican government as the likely provider of support for the aircraft being sold to Mexico. After a meeting concerning the Mexican Project, during which TBE discussed its proposal, Schaltenbrand informed TBE's vice president that he was interested in working for TBE after his duty with the Air Force ended. TBE suggested that Schaltenbrand fill out and submit an

²⁰⁴ 875 F.2d 699 (9th Cir. 1989) (en banc), cert. denied, 111 S. Ct. 384 (1991).

²⁰⁵ *United States v. Schaltenbrand*, 922 F.2d 1565 (11th Cir. 1991).

²⁰⁶ 18 U.S.C. § 207(a) (1988).

²⁰⁷ See *id.* Section 207(a) provides, in pertinent part, that any person covered who, after his or her employment has ceased, knowingly acts as an agent or attorney for, or otherwise represents, any other person (except the United States), in any formal or informal appearance before, or with the intent to influence, make any oral or written communications on behalf of any other person to any department of the United States in which he or she has participated personally and substantially while so employed shall be guilty of a felony.

²⁰⁸ See *id.* § 208(a). Section 208(a) provides, in pertinent part, that any covered person who participates personally and substantially in a particular manner, in which, to his or her knowledge, an organization with whom he or she is negotiating or has any arrangement concerning prospective employment has a financial interest, shall be guilty of a felony.

application, and that he discuss with the Air Force any potential conflicts of interest that might arise. While on an "inactive duty" status, Schaltenbrand submitted his application and discussed with TBE the possibility of employment. During his discussion with TBE, Schaltenbrand informed the defense contractor that he would take a course in Spanish to meet the contractor's qualifications. Several months later, and after Schaltenbrand had completed his work on the Mexican Project, TBE offered Schaltenbrand the position that he had discussed earlier with TBE.

After being offered the position with TBE, Schaltenbrand sought legal advice from the Air Force Judge Advocate General (JAG) deputy counselors²⁰⁹ to determine whether any conflict of interest rules would prevent him from accepting the job with TBE. Prior to their meeting, Schaltenbrand filled out a "Legal Assistance Record" card that contained a privileged information statement. The deputy counselors explained that they represented the government. During their meeting with Schaltenbrand, the counselors gave Schaltenbrand several printed materials covering the conflicts of interest statutes and regulations, and they answered general questions. When Schaltenbrand asked specific questions, however, the counselors informed him that their status as government representatives would not allow them to answer those questions, and that he would have to retain his own counsel to answer the questions.

Subsequently, Schaltenbrand, as a TBE employee, attended a "status conference" concerning the Mexican Project at an Air Force base. At the time of the conference, TBE still had not been awarded the contract on the project. Schaltenbrand's only purpose for being at the conference was to enable him to keep informed of project developments. Schaltenbrand's presence at this conference was the basis for his conviction under 18 U.S.C. sections 208(a) and 207(a).

In addressing Schaltenbrand's challenge of his conviction under section 208(a), the court noted that the only issue was whether Schaltenbrand's conduct in obtaining his position with TBE constituted "negotiation"²¹⁰ under

the statute. Schaltenbrand argued that because TBE had not made him an offer until after he was finished with the Mexican Project—thereby showing no interest on its side—no negotiations took place. Schaltenbrand relied on the court's decision in *United States v. Hedges*.²¹¹ In *Hedges* the court affirmed the district court's definition of "negotiation"²¹² and found that negotiations had occurred when an employer offered a salary and the prospective employee countered with a higher salary. The court, however, found Schaltenbrand's actions consistent with the definition affirmed in *Hedges*. The court opined that to require a formal offer is to read the statute too narrowly. The whole purpose of "negotiation" is for each side to present its position to the other party in hopes that it can convince the other party to agree on a certain principle or idea. The court would not, however, adopt the district court's definition of negotiation²¹³ in the *Schaltenbrand* case.

The court turned to Schaltenbrand's conviction under 18 U.S.C. section 207(a), which prohibits former government employees from representing private parties before the government on matters in which they previously worked for the government. The first issue the court had to address was whether Schaltenbrand had acted as an agent or attorney, or otherwise represented TBE at the status conference. Schaltenbrand argued that merely attending the conference as a passive observer could not constitute acting as an agent or attorney; nor could it constitute otherwise representing the firm. The court rejected Schaltenbrand's argument and found that even if he were not technically an agent of TBE, he "certainly 'otherwise represented' TBE." According to the court, Schaltenbrand's mere presence, as a former Air Force officer, could have had some influence on his former colleagues still acting on behalf of the government. Moreover, the court noted that Schaltenbrand potentially could have used his inside information to assist the TBE spokesman. The court found this type of "side-switching" to be precisely the kind of conduct that can make the citizenry suspicious of its public officials and the type of appearance of impropriety the Ethics in Government Act of 1978²¹⁴ sought to avoid.

²⁰⁹ The deputy counselors provide standards of conduct briefings for members of the Air Force inquiring about potential conflicts of interest. These attorneys also serve as attorney-advisors under the Legal Assistance Program.

²¹⁰ The term "negotiation" is not defined in the statute.

²¹¹ 912 F.2d 1397 (11th Cir. 1990); see Hahn, *United States v. Hedges: Pitfalls in Counseling Retirees for Employment*, *The Army Lawyer*, May 1991, at 16; Dorsey, Aguirre, Murphy, Jones, Cameron & Helm, *1990 Contract Law Developments—The Year in Review*, *The Army Lawyer*, Feb. 1991, at 75.

²¹² The district court in *Hedges* defined "negotiations" as "[a] communication between two parties with a view to reaching an agreement. Negotiation connotes discussion and active interest on both sides. Preliminary or exploratory talks do not constitute negotiation. Rather, to find negotiation, you must find that there was a process of submission and consideration of offerors." *Hedges*, 912 F.2d at 1403 n.2.

²¹³ The district court in *Schaltenbrand*, while instructing the jury, orally defined "negotiation" as "simply to converse with somebody else; carry on a conversation about something that you hope to do or intend to do." *Schaltenbrand*, 922 F.2d at 1570 n.1.

²¹⁴ The Ethics in Government Act of 1978 added "or otherwise represents" to the term "agent" and "attorney" in 18 U.S.C. § 207. See Ethics in Government Act, Pub. L. No. 95-521, 92 Stat. 1824 (1978).

The next issue the court examined was whether Schaltenbrand's attendance at the conference constituted a "formal or informal appearance" in connection with a contract or other particular matter. Schaltenbrand contended that the "particular matters" identified in 18 U.S.C. section 207(a), at which a former government employee is prohibited from appearing, must involve some element of potential controversy—or at least potential discretionary government action. The court noted that the contract at issue had not been finalized and that Schaltenbrand's presence possibly could have influenced government officials to make concessions later—concessions they might not have made had they not known Schaltenbrand was on the TBE team. Again, the court noted that the purpose of the statute was to avoid the appearance of impropriety and that this purpose is frustrated when a former government employee attends a meeting on behalf of a private contractor currently negotiating a contract with the government on matters in which the former employee had worked for the government.

The last issue addressed by the court was whether the attorney-client privilege applied to Schaltenbrand's discussions with the deputy counselors. In determining the existence of privileged communications, the court looked to whether the client reasonably understood the conference to be confidential. Based on the totality of the facts the court found that the communications were privileged; that Schaltenbrand came to the JAG office for legal advice; that he filled out a card that described Schaltenbrand as a client and described the attorneys as his lawyers; and, finally, that he was provided some legal advice. The court rejected the government's argument

that a reasonable non-lawyer would understand the legal significance of speaking to a standards of conduct counselor—as opposed to an attorney-advisor—about matters deemed privileged on the government's own form.

The *Hedges* and *Schaltenbrand* decisions clearly point out that government employees must avoid not only actual conflicts of interest, but also appearances of conflicts of interest. The significance of the *Schaltenbrand* decision is that the improper conduct was the mere attendance of a former government employee at a meeting concerning a procurement action on which the former officer had worked.

As of January 1, 1991, 18 U.S.C. section 207(a) was redesignated as section 207(a)(1). Interestingly, the new provision deletes the phrase "agent or attorney for, or otherwise represented." This deletion obviously eliminates any argument that the phrase "otherwise represented" is limited to professional advocacy, as Schaltenbrand tried to argue.

The *Schaltenbrand* case also supports the better practice of making judge advocates in an administrative and civil law division the installation standards of conduct or ethics advisors. This practice avoids any potential confusion about whom the attorney represents. Ethics counselors may expect more and more individuals to seek advice. The Office of Federal Procurement Policy Act Amendments of 1988,²¹⁵ which had been suspended until December 1, 1990, authorize procurement officials and former procurement officials to request an ethics advisory opinion from an agency ethics official on whether specific conduct, which has not yet occurred, would violate the law. Major Cameron.

²¹⁵ See Pub. L. No. 101-189, § 814, 103 Stat. 1495 (1989) (amending 41 U.S.C. § 423 (1988)). The law regulates the transfer of procurement information from government officials to contractors by prohibiting the disclosure of procurement related information prior to contract award and restricting contractor employment of former government procurement personnel.

Claims Report

United States Army Claims Service

Personnel Claims Note

Clothing and Other Items Being Worn

Claims for loss of, or damage to, clothing and other items being worn—such as jewelry, hearing aids, or eyeglasses—often present unique challenges to claims judge advocates. Some offices are misidentifying other types of losses as "CZ—Clothing and other items worn" losses in assigning Personnel Claims Management Program category codes, while other offices are paying clothing claims improperly.

In categorizing losses, paragraph 11-4g of Army Regulation 27-20, Legal Services: Claims (28 Feb. 1990)

[hereinafter AR 27-20], states that the "clothing and items worn" category is limited to the loss of clothing and similar items while they are *actually being worn*. Claims offices should *not* use the "CZ" code for claims involving lost laundry, lost duffle bags, or losses of clothing stored in unit supply rooms and other authorized places. Instead, those losses should be categorized as "ZZ" or "Q" losses.

Moreover, claims offices should not use the "CZ" code in certain peculiar situations in which other category codes apply. Claims offices should consider claims for loss of, or damage to, clothing and other items being worn incident to combat, lifesaving, and on-post rob-

beries under the provisions of paragraphs 11-4c(1), c(4), and h of AR 27-20, respectively. Combat and lifesaving losses should be characterized as "PZ" claims, while robberies should be considered as "RZ" claims. Similarly, claims offices should consider claims for damage to clothing being worn while the claimant is traveling on a Military Airlift Command flight under the provisions of AR 27-20, paragraph 11-4b(4), and categorize them as "FZ" claims. United States Army Claims Service (USARCS) cannot overemphasize the need for claims judge advocates to review category codes regularly and to ensure that they are accurate and consistent.

Paragraph 11-4f of AR 27-20 authorizes payment for the loss of, or damage to, clothing or other items being worn if two tests are met: (1) the loss must have occurred on a military installation or in the performance of military duty; and (2) the loss must have been caused by hurricane, fire, flood, or other unusual occurrence, or by theft or vandalism.

Paragraph 2-29c(1) of Department of Army Pamphlet 27-162, Legal Services: Claims (15 Dec. 1989) [hereinafter DA Pam 27-162], defines an "installation" for purposes of the Personnel Claims Act. If a soldier is assigned to duty away from a typical military reservation, that soldier's "installation" could be a single building, such as the Reserve Officer Training Corps building on a university campus. Additionally, in defining "performance of duty," note that *organized* physical training, on or off the installation, is deemed to be performance of duty.

Applying the second test—the requirement that any loss be caused by "hurricane, fire, flood, or other unusual occurrence, or by theft or vandalism"—presents greater problems. Claims for loss of clothing being worn because of hurricane, fire, or flood are rare, although occasionally a soldier whose unit is deployed to fight a forest fire might have clothing burned. Most claims for theft of clothing and other items being worn are covered by the rules for on-post robbery, which preclude payment for pickpocketed items. See DA Pam 27-162, para. 2-31a. The real problem lies in determining whether a loss is due to an "unusual occurrence."

An "unusual occurrence" is defined as an occurrence beyond the normal risks associated with day-to-day living and working; it is not a reasonably foreseeable consequence of normal human activity. See AR 27-20, para. 11-2d(1). Many incidents that may not appear to be "common" are not unusual occurrences. As a rule, any loss that is a predictable result of the type of work the claimant is performing is not an unusual occurrence—whether or not the claimant usually does that particular type of work.

Paragraphs 2-24c(14)-(17) of DA Pam 27-162 outline policies in this area. For example, contamination of clothing by toxic chemicals is considered an unusual

occurrence, even when the soldier or employee regularly works with these materials.

Except under very peculiar circumstances, however, a soldier's or civilian employee's spilling on his or her clothing paint, battery acid, oil, or ink, with which he or she is working, is not an unusual occurrence. Similarly, a soldier's or civilian employee's snagging or tearing clothing on a rough edge of a desk, a fence, or a loose spring in a seat is not an unusual occurrence; nor is an injured victim's having clothing cut away to have medical treatment rendered. Any decision to pay a loss of this nature must be coordinated with USARCS and fully explained in the claim file.

Similar rules apply to claims for eyeglasses. An employee's having his or her glasses accidentally knocked off by a customer or a protruding box is not an unusual occurrence; nor is a soldier's breaking his or her glasses while playing volleyball. Rather, these are normal hazards of day-to-day living and working. Claims personnel should note in this context that although the soldier's participation in a volleyball game for physical training would be considered "performance of duty," to be payable, the loss still must result from an unusual occurrence.

Claims for losses of jewelry and watches being worn are not often compensable. A soldier's losing a ring or a watch during a field exercise or a parachute jump is no more unusual than the same soldier's clothing being torn.

In short, an occurrence is not an "unusual occurrence" unless the nature or the severity of the occurrence is extraordinary. Lightning striking a jogger is an example of an occurrence that is unusual by its very nature. While a ceiling tile falling on a maintenance worker doing ceiling repairs would not be unusual, the entire ceiling collapsing would be. The severity of the latter makes it extraordinary.

Claims personnel must understand the principles underlying "unusual occurrences" and conscientiously apply the two tests when adjudicating claims for clothing and other items being worn. When claims are deemed to be the results of unusual occurrences, claims personnel also should consider whether the claimants possibly were negligent and they should record the basis for their determinations on the chronology sheets. Because of the uncertainties in this area and the potential for error, claims offices are encouraged to contact USARCS prior to paying these claims. Mr. Frezza.

Affirmative Claims Note

Using the DA Form 1667 as an Affirmative Claims Journal

One of the problems the General Accounting Office (GAO) identified in its report, *Military Health Care*:

Recovery of Medical Costs from Liable Third Parties Can Be Improved, GAO/NSIAD-90-49 (Apr. 1990), was a lack of affirmative claims internal controls. The GAO faulted The Judge Advocate General's Corps for not being able to identify what action was taken on all potential medical care claims that military hospitals referred to claims offices.

The automated Affirmative Claims Management Program fielded in October 1990 addresses some of the internal control problems identified by GAO and the next version of this program will include a small database for recording information on potential claims. Until then, the affirmative claims journal remains a valuable management tool for the recovery judge advocate (RJA) to use in monitoring progress on affirmative claims. Actually, it is an RJA's only management tool for tracking potential affirmative claims.

Affirmative claims personnel must remember that they should not create a claims record in the automated database until they determine that sufficient information is available to make an assertion. *See Users Manual for the Revised Affirmative Claims Management Program 19* (Sept. 1990). Accordingly, only potential claims investigated, but not asserted, will appear in the journal.

Paragraph 15-1a of AR 27-20 directs field claims offices to maintain the affirmative claims journal using DA Form 1667, Claims Journal for (Personnel) (Torts) (Affirmative) Claims. The journal should include both potential claims and asserted claims, but large offices may wish to keep separate journals for potential claims and asserted claims. To standardize use of the DA Form 1667 as an affirmative claims journal, USARCS recommends entering the following data in the columns on the form.

(a) In the "File Number" column, enter a four-digit number for potential claims identified and logged. When the claim is asserted, also enter the actual claim number generated by the Affirmative Claims Management Program.

(b) In the "Name and Address of Claimant" column, for all claims and potential claims, enter the name (and address, if desired) of the injured party, or the type of property damaged and the organization to which it belongs. On a potential medical care claim, if a questionnaire was dispatched to the injured party, also enter the date of dispatch. This provides the RJA with a means of reviewing the action taken.

(c) In the "Date Claim Received and Amount Claimed" column, enter the date you asserted a claim against the tortfeasor and the amount asserted. If you determine after investigation that you will not assert a potential claim, enter a slash in this column instead.

(d) The "Incident" and "Co-Claim or Master File" columns are self-explanatory.

(e) In the "Withdrawn/Abandoned" column, enter the date an asserted claim was terminated for the convenience of the government. If you terminated the claim locally (without needing approval from an area claims office or USARCS), also enter an "L."

(f) In the "Date Denied" block, enter the date a medical care claim was waived. If you waived the claim locally, also enter an "L."

(g) In the "Date and Amount Approved" column, enter the date a claim was compromised and the amount compromised. If you compromised the claim locally, also enter an "L."

(h) Because computation of processing time is not important to affirmative claims, use of the "Processing Time" column is optional.

(i) You may use the "Reconsideration/Appeal" columns to record information on attorney agreements or litigation, although this is also optional.

(j) In the "Affirmative Claim Recovery" column, enter any amount recovered and the date the money was deposited. Maintain a suspense system to ensure that money promised in settlement actually is received. If payment is received in installments, enter the date the first installment was deposited. For reporting purposes, consider a claim paid in installments "collected" on the date the first payment is deposited.

(k) Use the "Date Forwarded for Recovery/Retirement" column to indicate that action is completed on a claim. For example, if a claim was collected in full in one installment—as in (j) above—or a potential claim was closed without a demand—as in (c) above—enter the date in this column to show readily that no further action is necessary. If a claim is recovered in installments, enter the date the last installment is recovered and the total amount deposited in this column.

At least monthly, RJAs should review the affirmative claims journal to determine the status of affirmative claims in their offices. Mr. Frezza.

Management Note

Designation of an Area Claims Office

Effective 13 February 1991, the Commander, United States Army Claims Service, Europe, designated the VII Corps Rear Headquarters and 56th Field Artillery Command on Kelley Barracks, Stuttgart, Germany, as an area claims office and granted claims settlement authority to it. Its office code will be E75. This office will process

reconsideration actions under chapter 11 of AR 27-20, appellate actions under chapter 3 of AR 27-20, and personnel and tort claims beyond the monetary jurisdiction of the VII Corps claims processing offices in Robinson

Barracks, Munich, Augsburg, Heilbronn, and Vaihingen. It also will pay claims adjudicated by the VII Corps special claims processing office in Saudi Arabia. Lieutenant Colonel Thomson.

Labor and Employment Law Notes

*OTJAG Labor and Employment Law Office, FORSCOM Staff Judge Advocate's Office,
and TJAGSA Administrative and Civil Law Division*

Civilian Personnel Law

Nonhandicapping Condition May Warrant Mitigation

In what appears to be a continuing trend, the Merit Systems Protection Board (MSPB or Board) again has mitigated an agency removal action to a ninety-day suspension. In *Kelly v. Department of Health and Human Services*, 46 M.S.P.R. 358 (1990), the Department of Health and Human Services (HHS) removed appellant for two instances of shoplifting. The agency relied on the appellant's prior disciplinary record of a one-day suspension and a reprimand—both for tardiness. The administrative judge (AJ) sustained the charged misconduct, but reversed the action after finding that appellant's diagnosed "atypical depression" substantially limited a major life activity by interfering with her availability for work and caused her to engage in the misconduct.

The Board noted that the appellant's psychiatrist never had testified that her depression limited any specific major life activities. The appellant, therefore, had failed to carry her burden of showing that she had a mental condition that substantially limited her ability to work or any other major life activity. The Board ruled that the seriousness of the appellant's off-duty misconduct did not outweigh the facts that she had twenty-three years of satisfactory service and had rehabilitation potential. The Board also "considered" her mental condition in reviewing the appropriateness of the penalty. It found that a suspension would serve as an effective sanction and would deter future misconduct.

Occupational Stress

The MSPB has decided an appeal of a removal effected by Fort Sam Houston in 1985. The appellant, a classification specialist in the personnel office, had successfully challenged her 1982 removal for misconduct. The Army Director of Equal Employment Opportunity (EEO) had ruled that the removal was in retaliation for activity protected by title VII and had ordered her reinstatement. He did not, however, order her requested relief of an assignment to Panama, where she previously had worked. While the appellant unsuccessfully challenged the denial of that relief before the Equal Employment Opportunity Commission and district court, the Army attempted to reinstate her. She never returned to work, however, contending that post traumatic stress disorder, which was caused by "occupational stress factors," prevented her return. After she exhausted her sick leave, the Army

placed her in an absent without leave (AWOL) status and eventually removed her. She initially challenged the removal through EEO procedures, alleging discrimination based on race, sex, age, national origin, marital status, and physical and mental handicaps, as well as reprisal. She later exercised her right to appeal to MSPB, when the agency had not issued a final decision on the complaint after 120 days. The AJ initially dismissed the appeal as untimely, but the Board remanded for an adjudication of the merits. *Cohen v. Department of the Army*, 42 M.S.P.R. 275 (1989).

On remand, the AJ ruled that the appellant had not established that she was a "qualified handicapped person" because medical testimony established that the appellant was not immediately able to perform the duties of her position at another location. The AJ sustained the AWOL charges and the resulting removal.

The Board denied the appellant's petition for review but reopened the appeal. It reviewed the testimony of the two expert witnesses. The Army's clinical psychologist had testified that the appellant permanently was incapacitated with respect to her duties at Fort Sam Houston, but that she could perform the duties of her position at another location. The MSPB stated that, based on the psychologist's opinion, the appellant was not handicapped. An impairment is not a handicap merely because it prevents an employee from meeting the demands of a particular job. Rather, "the impairment must foreclose generally the type of employment involved." The appellant's psychiatrist had stated that the appellant could not perform any civil service job for at least three to five years. Even then, she would be able to perform only at a diminished performance level and only after retraining. If it accepted that opinion, the Board noted, the appellant was handicapped. She was not "qualified," however, because maintaining an employee on the rolls for three to five years on "the mere possibility that she might then be able to be retrained for a job other than the one she was previously performing" would impose undue hardship on the Army. The Board concluded that, regardless of which expert it believed, the appellant had failed to establish a prima facie case of handicap discrimination. It accepted the AJ's other rulings and sustained the removal. *Cohen v. Department of the Army*, 46 M.S.P.R. 369 (1990).

Drug-Related Off-Duty Supervisory Misconduct

In a potentially overlooked but important decision, the MSPB has ruled that off-duty drug-related misconduct

can establish nexus in a chapter 75 action. In *Hawkins v. Department of Veterans Affairs*, 46 M.S.P.R. 484 (1990), a housekeeping aide foreman was demoted to housekeeping aid for "off duty misconduct unbecoming a government employee"—specifically, unlawful possession of marijuana and cocaine and unlawful possession of cocaine with intent to sell or deliver. The agency originally had proposed removal, but decided on a demotion when the employee provided information concerning his drug abuse and rehabilitative treatment. The AJ found that the agency had not proven a nexus between the misconduct and the efficiency of the service. The Board reversed the initial decision and upheld the demotion, finding that the employee was in a position of trust and, "in light of his supervisory position, the appellant's serious and felonious misconduct of possessing cocaine with the intent to sell it does bear a nexus to the efficiency of the service." This decision might mark the beginning of including drug-related misconduct in the application of the nexus presumption in certain "egregious circumstances." Cf. *Hayes v. Department of Navy*, 727 F.2d 1535 (Fed. Cir. 1984). As with murder or serious sex offense cases, labor counselors should argue this presumption, but not rely exclusively on it in preparing the agency's case.

Employee and Agency Burdens of Proof in Whistleblower Cases

In *McDaid v. Department of Housing and Urban Development*, 46 M.S.P.R. 416 (1990), the Board clarified the respective burdens of proof in an employee's individual right of action (IRA) appeal. In an IRA appeal, the employee initially must prove by a preponderance of the evidence that a protected disclosure described in 5 U.S.C. section 2302(b)(8) was a "contributing factor" in the personnel action taken against him or her. In other words, the employee first must show that his whistleblowing activities, more likely than not, had something to do with management's action. Then the agency must show by clear and convincing evidence—that is, "that measure or degree of proof which will produce in the mind of the trier of facts a firm belief or conviction as to the allegations sought to be established"—that it would have taken the same personnel action, absent the protected disclosure. In *McDaid* the Board found that the employee had made a protected disclosure, but that he failed to meet his initial burden because he could not show that the management official had actual or constructive knowledge of the disclosure and because the act complained of was not within a period of time in which a reasonable person could conclude that the disclosure was a factor in the personnel action.

Settlement Discussions Improper Consideration in Mitigation

In *Hosey v. United States Postal Service*, 46 M.S.P.R. 441 (1990), the MSPB reinstated the original agency

penalty of removal. The Postal Service had removed the appellant for submitting two falsified doctors' excuses with the intent to deceive the agency. In selecting the penalty, management had considered appellant's prior disciplinary record, which included two fourteen-day suspensions, two seven-day suspensions, and a letter of warning for misconduct related to absences from work. The AJ reduced the penalty to a sixty-day suspension, relying to some extent on recommendations from appellant's supervisors that he be suspended rather than removed. The Board recognized that the supervisors had signed the notice of proposed removal. The suspension "recommendation" actually had occurred during settlement negotiations. The Board found the AJ's consideration of those statements to be improper. After considering the relatively short length of the appellant's service, the significant history of prior discipline, and the seriousness of the offense, the Board agreed that the Postal Service properly had exercised its judgment in imposing the penalty of removal.

Labor Law

Conversations with Union Representative Are Privileged

In *United States Department of the Treasury, Customs Service, Washington, D.C., and National Treasury Employees Union*, 38 F.L.R.A. 1300 (1991), the Federal Labor Relations Authority (FLRA or Authority) considered an issue of first impression in reviewing the Customs Service's exceptions to an AJ's recommended finding that the Customs Service had violated 5 U.S.C. section 7116(a)(1). The agency issued a notice of proposed removal to a customs inspector in the bargaining unit on charges of dishonest conduct. The inspector sought union representation. At the employee's oral reply meeting, the union representative revealed some facts that he had learned during his discussions with the employee. The Customs Service reopened its investigation of the matter. The investigating agent questioned the inspector, who did not remember all the information that the union representative had revealed at the oral reply meeting. With the approval of the Customs Service's labor relations staff and regional counsel, the agent then interrogated the union representative about his earlier discussions with the inspector. The unfair labor practice (ULP) charge resulted. The AJ ruled, "The subsection of an employee's representative to interrogation concerning statements made by the employee to the representative violates [section 7116(a)(1)] because it directly interferes with, restrains, or coerces the employee in the exercise of rights under the Statute." The Authority agreed with the AJ's conclusion. It rejected the agency's argument that when an agency has a reasonable belief that a union representative has information about an employee's misconduct that could lead to disciplinary or criminal action, the agency may question the union representative. The FLRA ordered a nationwide posting signed by the Commissioner of Customs.

Availability of Internal Management Recommendation

In *National Labor Relations Board and National Labor Relations Board Union*, 38 F.L.R.A. 506 (1990), the FLRA provided a definitive interpretation of the scope of the exclusion in 5 U.S.C. section 7114(b)(4)(C). Section 7114(b)(4) requires an agency to provide certain data to the union upon the union's request. But subsection C of that section excludes from release data that constitutes "guidance, advice, counsel, or training provided for management officials or supervisors, relating to collective bargaining." In this case, a National Labor Relations Board (NLRB or Board) regional director (RD) had recommended to Board headquarters that the request by one of his attorneys for part-time employment be denied. After the Board denied the request, the union grieved the denial and requested a copy of the RD's memorandum recommending the denial. The NLRB, however, refused to provide the memorandum. It contended that the document constituted advice relating to "collective bargaining," reasoning that the RD's recommendation concerned the administration of contract provisions on part-time employment. The FLRA reviewed its earlier decisions interpreting section 7114(b)(4) and legislative history. Accordingly, it concluded that subsection C exempts from disclosure only guidance and similar matters

relating specifically to the collective bargaining process, such as: (1) courses of action agency management should take in negotiations with the union; (2) how a provision of the collective bargaining agreement should be interpreted and applied; (3) how a grievance or an unfair labor practice charge should be handled; and (4) other labor-management interactions which have an impact on the union's status as the exclusive bargaining representative of employees.

The Authority ruled that the exclusion does not apply to management advice concerning the conditions of employment of unit employees. It therefore ordered the NLRB to furnish the document to the union.

Waiver of Right to Home Addresses

The FLRA ruled that the parties' bargaining history established that the union had waived its 5 U.S.C. section 7114(b)(4) right to the home addresses of bargaining unit members. An AJ had recommended dismissal of a complaint alleging that the agency violated sections 7116(a)(1), 7116(a)(5), and 7116(a)(8) by refusing to supply home addresses. The AJ had examined the parties' bargaining history and found that the union had abandoned its proposed right of access to home addresses "as a quid pro quo for access to work areas to distribute literature." The negotiations at issue had occurred prior to the FLRA's ruling on availability of home addresses in *Farmers' Home Administration Finance Office, St. Louis, Mo.*, 19 F.L.R.A. 195 (1985). The AJ further ruled that the agency's refusal, subsequent to the FLRA's decision

that unions are entitled to this information, did not violate section 7116. The FLRA agreed with the AJ that bargaining history alone can support a finding of a waiver of a statutory right. It rejected the General Counsel's argument that the union could not waive a statutory right that it did not have at the time of the so-called waiver. The FLRA observed that the local involved in the litigation that resulted in the FLRA's decision in *Farmers' Home Administration* was part of the same national union involved in the instant dispute. It therefore ruled that the union had notice that the Authority was considering the issue at the time of the negotiations, and that the union chose to abandon its pursuit of the right in exchange for a "palatable substitute." *United States Department of the Navy, United States Marine Corps (MPL), Washington, D.C., and Marine Corps Logistics Base, Albany, Ga., and American Federation of Government Employees*, 38 F.L.R.A. 632 (1990).

Work Now, Grieve Later—But Only if On Duty

The FLRA sustained an arbitrator's award that had reversed the agency's suspension of grievant for insubordination. The grievant inspected cargo and luggage at the Seattle-Tacoma Airport (SEATAC). On certain days he also worked in the agency's Seattle office. Agency policy required that, whenever an inspector discovered an insect in a shipment—that is, an "intercept," he or she would place the insect in a vial of alcohol for transportation to the Seattle office for identification. At the end of one particular shift at SEATAC, the grievant was ordered by management to take an "intercept" home with him and to take it to the Seattle office the next day, when he was to report for work there. When grievant refused to perform the "work" without compensation, management suspended him for five days. The arbitrator found that the agency policy was to request, but not to require, off-duty inspectors to transport intercepts. Concluding that the agency had no authority to order grievant to transport the intercept in an off-duty status, he determined that the "work now, grieve later" rule did not apply because the agency had no authority to control what the grievant did on off-duty, uncompensated time. Accordingly, he reversed the suspension. The Authority accepted the arbitrator's reasoning and denied the agency's exceptions. *United States Dep't of Agric., Animal and Plant Health Inspection Serv., Plant Protection and Quarantine, Hyattsville, Md., and National Ass'n of Agric. Employees*, 38 F.L.R.A. 1291 (1991).

Arbitration of Statutory Interpretation

In *Muniz v. United States*, No. C-88-1894 FMS, (N.D. Cal. Jan. 26, 1991), three named plaintiffs filed a class action on behalf of former federal firefighters seeking customarily and regularly received overtime pay under the Fair Labor Standards Act (FLSA) as part of their lump-sum payments for accrued annual leave under 5 U.S.C. section 5551. The court recognized that under 5

U.S.C. section 7121(a), collective bargaining agreement (CBA) grievance procedures are the exclusive method for resolving disputes that fall within the coverage of the CBA unless the CBA excludes the matter. The court rejected the plaintiff's assertions that the applicable CBA precluded the arbitrator from interpreting law and granted a motion for summary judgment, dismissing the suit for lack of subject matter jurisdiction.

Equal Employment Opportunity Law

"Overqualified" Synonymous with "Age Discrimination"

In *Taggart v. Time, Inc.*, 924 F.2d 43 (2d Cir. 1991), the United States Court of Appeals for the Second Circuit reversed the district court's grant of summary judgment in favor of the employer. Taggart, with over thirty years experience in the printing industry, was hired at age fifty-eight as a print production manager. Unfortunately, six months later, the division he worked for was eliminated. Taggart applied for about thirty-two positions in various other divisions in Time but was not selected because "Taggart was overqualified for some positions, under-qualified for others, his ... supervisor's recommendation was not wholly positive, and he performed poorly at the interviews." Addressing Time's rejecting Taggart to fill certain positions solely because he was overqualified, the circuit court noted that claiming someone is unqualified because he is overqualified is a non sequitur. "Denying employment to an older job applicant because he or she has too much experience, training or education is simply to employ a euphemism to mask the real reason for refusal, namely, in the eyes of the employer the applicant is too old." Accordingly, the court found that Taggart had established a prima facie case and remanded the matter for a trial on the merits.

Wards Cove Revisited

Supreme Court decisions not only establish broad rules that are the "law of the land," but also are outcome-directive to the parties in the particular case decided. Rarely is attention paid to what happens when a particular case is remanded back to a lower court when the Court has established a new or a different interpretation of a rule of law.

Recently, a significant 1989 affirmative action decision was decided by the district court using the standard announced by the Supreme Court. The Court had remanded the decision back to the Ninth Circuit Court of Appeals, which in turn remanded it back to the district court. See *Atonio v. Wards Cove Packing Co.*, No. C-74-145-JLQ (D. Wash. Jan. 23, 1991).

In *Wards Cove Packing Co. v. Atonio*, 109 S. Ct. 2115 (1989), the Court was asked to decide a case in which white employees occupied almost all the skilled non-

cannery jobs at a salmon cannery in Alaska, while the nonskilled jobs in the fish cannery were filled almost exclusively by minority workers—typically Filipinos, Alaskan natives, and other nonwhites. The unskilled cannery workers contended that their inability to be hired for the skilled noncannery jobs amounted to discrimination. The Ninth Circuit found for the cannery workers, relying on statistics that showed a high percentage of nonwhites in the cannery jobs and a low percentage of nonwhites in the noncannery jobs.

The Supreme Court reversed, holding that "if the absence of minorities holding skilled positions is due to a dearth of qualified nonwhite applicants ... petitioner's selection methods cannot be said to have a 'disparate' impact on nonwhites." The Court held that a statistical showing of racial imbalance between the skilled jobs and the nonskilled jobs, standing alone, was insufficient to establish a prima facie case of discrimination. The Court said that the proper comparison should be between the racial composition of "at-issue" jobs and the racial composition in the relevant labor market. Therefore, the cannery workers, who did not possess the requisite skills, were not part of the "relevant labor market."

The Ninth Circuit remanded the case back to the district court in Washington State in which it had originated. In January 1991—seventeen years after the case first arose—the district court dismissed the claims that Wards Cove Packing Company and two other firms discriminated against nonwhites in the hiring for skilled jobs. The district court looked at the percentage of whites hired by the canneries and determined that the percentage of whites hired for the "at-issue" jobs did not exceed the percentage of whites in the available labor force, except for certain limited instances in which the court found no statistical significance.

Not Counseling an Employee to Avoid a Complaint Is Discriminatory

In *Vaughn v. Edel*, 918 F.2d 517 (5th Cir. 1990), the United States Court of Appeals for the Fifth Circuit held that an employer violated title VII when it declined to criticize the work of a black employee who was later discharged because she was a poor performer. In this case, the immediate supervisor did not confront the employee about the poor work performance specifically to avoid charges of racial discrimination. This "tolerance" continued for about two years, with the employee being rated "satisfactory" and even receiving a merit increase. Subsequently, in downsizing efforts, the company fired its two "poorest performers," including the black employee. The court ruled that the employer ignored its own regulations and procedures because of a racial motive. The court believed that the supervisor's decision not to counsel the employee was out of self-interest, rather than racial hostility. Nevertheless, the court ruled that this race-conscious decision was illegal.

Personnel, Plans, and Training Office Note

Personnel, Plans, and Training Office, OTJAG

The Army Management Staff College

One Army civilian attorney recently was selected for the Army Management Staff College (AMSC) Class #91-2 (13 May thru 16 August 1991). The attorney selected is:

Stephen S. Malley

GS-12, Headquarters, National Training Center and Fort Irwin, Fort Irwin, California

Currently, two Army civilian attorneys are attending AMSC Class 91-1: Bruce I. Topletz, NM-13, United States Army South, Fort Clayton, Panama; and Herman A. Dyke, Jr., GS-12, OSJA, 3d Armored Division, Hanau, Germany.

AMSC is a fourteen-week resident course designed to instruct Army leaders in functional relationships, philosophies, and systems relevant to the sustaining base environment. It provides civilian personnel with training analogous to the military intermediate service school level.

The Judge Advocate General encourages civilian attorneys to apply for AMSC as an integral part of their individual development plans. Local Civil Personnel Offices are responsible for providing applications and instructions. Interested personnel also may obtain information by contacting Mr. Roger Buckner, Personnel, Plans, and Training Office (AVN: 225-1353). Dates concerning future classes will appear in *The Army Lawyer*.

The Summer Intern Program

*Captain Christopher Patterson
Professional Recruiting Office*

Introduction

Each summer, law students work for the Army Judge Advocate General's (JAG) Corps as interns in offices worldwide. These interns, representing accredited law schools from all fifty states and Puerto Rico, are highly motivated and inquisitive about the workings of the JAG Corps. Many judge advocate officers, however, tend to treat these interns as clerical help instead of using them in a manner that recognizes the importance of this program—that is, recruiting new judge advocates and creating sources of information about Army law. In addition, the quality of the law students participating in this program—and the potential for their becoming true legal assets to their offices—is evidenced by the fact that, over the past five years, ninety-four percent of former interns who applied for JAG Corps commissions were selected.

Because they exhibit excellent potential as future Army officers, the JAG Corps must use the interns' experiences as an opportunity to sell them on the benefits of our practice, as well as our quality of life. Memorable experiences and significant assignments not only convince interns that a career in the JAG Corps will provide them with immediate responsibilities and stimulating challenges, but also create "JAG ambassadors" at their respective law schools. Therefore, to enhance the use of interns, this article presents a "cookbook" approach to the summer intern program. It is designed to provide a brief description of the intern selection process, legal offices' responsibilities, and suggestions on ways to enhance the program.

Description of the Program

The United States Army Judge Advocate General's Corps hires 100 law students—seventy-five second-year and twenty-five first-year—each summer to work as legal interns in Army legal offices throughout the United States and overseas. Interns are hired as temporary civil service employees for a maximum period of ninety working days starting in May or June of each year. Students who have completed two years of law school are paid at the GS-7 federal pay level. Students who have completed one year of law school are paid at the GS-5 federal pay level. These are not military positions and no military obligation is incurred by participation in the program. Interns work under the supervision of an attorney and perform legal research, write briefs and opinions, conduct investigations, interview witnesses, and assist in preparing civil or criminal cases.

The JAG Corps seeks law students with proven scholastic ability and demonstrated leadership potential. Applicants must be full-time students at a law school accredited by the American Bar Association. Students in four-year programs are eligible for the Summer Intern Program after completing their second year of law school. Applicants must be United States citizens. The JAG Corps is an equal opportunity employer and actively seeks applications from women and minority group members.

Boards are held twice annually—usually in November and again in March—to select interns. The fall board

selects only second-year applicants, while the spring board selects only first-year applicants. Application materials must be submitted no later than 1 November and 1 March for their respective boards. Application materials may be obtained at most law school placement offices, or by contacting the Professional Recruiting Office toll free at 1-800-336-3315 (Virginia at 1-703-355-3323). Selection recommendations are made by a board of JAG officers, with The Judge Advocate General approving all summer intern selectees. The quality of the applicants, the limited number of available positions, and the selection process make the competition for employment as a summer intern extremely keen.

Interns are assigned to positions at Army legal offices in Washington, D.C., and at installations throughout the United States and overseas. Because they do not hold military positions, interns must pay all costs of traveling to their job location, as well as arranging and paying for all housing expenses. Intern assignments are based primarily upon the desires of the intern coupled with the needs of the Corps, and are made by the Professional Recruiting Office (PRO).

Office Responsibilities

In the fall, PRO solicits responses from Army legal offices worldwide on whether interns are required and, if so, how many. After selections are made and assignments determined, PRO notifies offices in which interns will be placed. Along with this notification, PRO provides offices with an applicant's resume, summer intern application (DAJA-PT Form 13), and standard form 171. Upon receipt of this information, the office must accomplish several actions.

First, personnel at each office should acquaint themselves with the intern's record and circulate the resume throughout the office. This will allow every member of the office to know significant parts of the intern's background before he or she arrives at the office. Being acquainted with the intern is particularly important because talking to the intern while incorporating items of his or her background will leave a lasting favorable impression. Establishing a good first impression with the intern is the secret to a successful summer for both the office and the intern.

Secondly, the staff judge advocate (SJA) or senior legal advisor should assign a sponsor for the intern. Sponsorship is a critical component of this program. SJAs should assign a sponsor who has something in common with the intern. In many cases, interns want sponsors closer to their own age. They feel that this will enable them to become more familiar with life in the JAG Corps upon graduation from law school.

The sponsor should assist the intern with making housing arrangements. Sending interns an installation welcome packet is a good way to provide the intern with an

orientation of the command's mission, as well as area housing and attractions. Housing issues are the concerns expressed most frequently by interns. Solving billeting problems before the intern's arrival will facilitate a smooth transition into the work place.

The intern's sponsor should be readily available to answer questions about the office, the JAG Corps, and the Army. Remember, these law students have little or no exposure to the military. While they may not ask, assume that the interns need to know basic things, such as how to recognize different ranks, military courtesies, and customs of the service. The sponsor also should acclimate the intern to the types of work done by the office. This best may be accomplished by taking the intern around the office the first couple of days and introducing them to all office employees. Have office employees provide brief descriptions of their responsibilities to the intern. An overview of office functions will assist the intern in understanding attorneys' responsibilities, and how they impact the entire office's function.

The office also should assign a supervisor to the intern who will oversee his or her progress during the summer. The sponsor, for instance, also may be the assigned supervisor. The supervisor should devise a work schedule for the intern. Requests for intern's services in other offices or divisions should be channeled through the supervisor. This allows the equitable distribution of work and permits interns to feel as if they have a single point of contact to whom to turn for answers. When planning the work schedule, keep in mind that interns want to feel challenged. These are highly motivated law students who are seeking responsibility and experience. Make the work as interesting as possible. Experience demonstrates that an intern's enthusiasm for the JAG Corps will diminish significantly if most of his or her time is spent "shepardizing" cases or performing similar types of routine tasks.

Additionally, supervisors must consider the intern's strengths and weaknesses. Utilize interns' strengths, but also try to develop the weaker points of their experience. For example, if an intern is particularly strong in the area of wills and trusts, but not confident in front of people, a supervisor may want to consider starting the intern in a legal assistance capacity and then exposing him or her to depositions or Magistrate's Court. An intern usually is extremely gratified knowing that the JAG Corps tried to enhance his or her development as an attorney.

Inprocessing

The intern's first day should be the same as any other full-time employee's first day. The sponsor should arrange a meeting with the SJA and supervisor before being escorted around the office for introductions. After introductions, the supervisor should provide the intern with a detailed explanation of what is expected as well as the planned workload. The supervisor should take time to

show the intern where research materials and office supplies are located. Further, if the office has automated legal research capabilities, the supervisor should ensure that the intern has access to them. This is a good way to enhance the intern's personal development while gaining valuable research support. Because most law schools now teach automated legal research techniques, offices usually will benefit from the intern's expertise. Finally, the supervisor should, when possible, assign the intern to a particular work area. Find a place that the intern may call "home" for the summer. A good working environment undoubtedly will enhance the intern's productivity.

Intern Responsibilities

The hallmark of the summer intern program is the opportunity for law students to receive responsibility and experience while being challenged. To achieve that end, supervisors must provide the intern with meaningful assignments. Certainly, this does not mean that SJAs have to task an intern with monumental projects—even though some interns will be able to handle such assignments. Rather, supervisors should provide significant assignments that require the intern to budget time and effort appropriately to ensure that suspenses are met. These types of projects not only will enhance the intern's personal development, but also will make the intern feel that he or she is providing a significant effort in accomplishing the office's mission.

All assignments should be channelled through the intern's supervisor. This allows centralized control of the intern and his or her taskings. A single point of contact also will help to avoid confusing instructions and multiplicitious assignments. It also will tend to discourage the assignment of menial tasks.

The assigned supervisor should bear the sole responsibility of actually supervising the intern. Accordingly, the supervisor should provide the intern with comments on work product, as well as suggestions on how the intern can improve and develop professionally. Office personnel should remember that these interns are still in law school and that the JAG Corps has a unique and important opportunity to develop solid advocacy skills in each of them. Accordingly, supervisors also should be teachers and should provide feedback to the intern as often as possible.

Selling the JAG Corps

The intern's summer should not be limited to just academics. Supervisors, as well as all office members, should take the opportunity to educate the interns on the everyday workings of the SJA office and its interrelationships with other installation offices. A thorough office orientation will assist in this education.

Offices also should give interns as much exposure to military law as is practicable. Interns should be permitted to sit in on legal assistance and claims interviews. In addition, they should be encouraged to observe court-martial, magistrate court cases, and administrative separation proceedings. Interns need to be shown the variety and diversity of our practice.

The education should not stop with the unique aspects of military law. Interns also should be exposed to other aspects of the service, such as military life and customs. For example, offices should include their interns when they attend change-of-command, retirement, and awards ceremonies. Further, supervisors should ensure that interns are invited to hail-and-farewells, "bring-your-boss" and "right-arm" nights, and other office social functions. SJAs should ensure that their interns see what life is really like as a JAG officer. Additionally, as a means of enhancing their experience, PRO will provide summer interns a list of where all interns are assigned in hopes that they may socialize together and share their different experiences.

Finally, all JAG Corps personnel should remember that most interns are away from home and may be living alone. Accordingly, supervisors and sponsors should be patient and sensitive to the needs of the intern. Mentorship is extremely important—interns will have a number of questions not only on the practice of law in general, but also on the life style of the particular geographical region in which the office is located. With proper and personalized attention, these interns will develop a bond with the JAG Corps that may result in a commission.

Saying Good-Bye

Just when SJA office personnel feel that their intern is providing valuable assistance to the office, the time will come to say good-bye. Supervisors should ensure that the intern feels as if he or she contributed to the office. The office should consider taking their interns to lunch or providing other appropriate forms of recognition to let them know how much their help was appreciated. In addition, SJAs and supervisors should offer to write letters of recommendation, either for a commission or for future internships. A general letter of commendation often may be appropriate. Supervisors also should consider writing their interns after they have returned to school to wish them success during the academic year. This is particularly critical with second-year interns because they will begin applying for accession into the JAG Corps in the fall of their third year.

These interns invariably become ambassadors of the JAG Corps once they return to their schools. They have more practical knowledge of the intern program than most placement directors. Therefore, many students will approach them for information on their experiences.

Accordingly, SJAs should obtain recruiting literature from PRO and provide it to their interns to take back to school with them. These interns may know others who would be interested in our program or the JAG Corps in general. Most important, all SJA office personnel must ensure that interns remain enthusiastic about the JAG Corps because they will be promoting the Corps at their respective law schools.

The summer intern program is a great opportunity for the Army JAG Corps to show law students what military

practice is all about. With preparation and supervision, the intern's experience will be memorable and beneficial to both the JAG Corps and the individual. Because every JAG officer has a responsibility to recruit new members to the Corps, offices should use this program to show interns the best aspects of the JAG Corps diverse legal practice. With a little effort, each office—as well as the entire JAG Corps—will reap substantial benefits from a productive summer intern experience.

CLE News

1. Resident Course Quotas

The Judge Advocate General's School restricts attendance at resident CLE courses to those who have received allocated quotas. If you have not received a welcome letter or packet, you do not have a quota. Personnel may obtain quota allocations from local training offices, which receive them from the MACOMs. Reservists obtain quotas through their unit or, if they are nonunit reservists, through ARPERCEN, ATTN: DARP-OPS-JA, 9700 Page Boulevard, St. Louis, MO 63132-5200. Army National Guard personnel request quotas through their units. The Judge Advocate General's School deals directly with MACOMs and other major agency training offices. To verify a quota, you must contact the Nonresident Instruction Branch, The Judge Advocate General's School, Army, Charlottesville, Virginia 22903-1781 (Telephone: AUTOVON 274-7115, extension 307; commercial phone: (804) 972-6307).

2. TJAGSA CLE Course Schedule

1991

3-7 June: 107th Senior Officers Legal Orientation Course (5F-F1).

10-14 June: 21st Staff Judge Advocate Course (5F-F52).

10-14 June: 7th SJA Spouses' Course.

17-28 June: JATT Team Training.

17-28 June: JAOAC (Phase VI).

8-10 July: 2d Legal Administrators Course (7A-550A1).

11-12 July: 2d Senior/Master CWO Technical Certification Course (7A-550A2).

22 July-2 August: 125th Contract Attorneys Course (5F-F10).

22 July-25 September: 125th Basic Course (5-27-C20).

29 July-15 May 1992: 40th Graduate Course (5-27-C22).

5-9 August: 48th Law of War Workshop (5F-F42).

12-16 August: 15th Criminal Law New Developments Course (5F-F35).

19-23 August: 2d Senior Legal NCO Management Course (512-71D/E/40/50).

26-30 August: Environmental Law Division Workshop.

9-13 September: 13th Legal Aspects of Terrorism Course (5F-F43).

23-27 September: 4th Installation Contracting Course (5F-F18).

3. Civilian Sponsored CLE Courses

August 1991

1-3: NIBL, Northeast Bankruptcy Law Institute, Boston, MA.

4-9: AAJE, Literature and Law, Rockland, ME.

11-16: AAJE, Judicial Writing—Trial Judges, Colorado Springs, CO.

11-16: AAJE, Evidence, Colorado Springs, CO.

18-23: AAJE, Advanced Evidence, San Francisco, CA.

19-23: FP, The Skills of Contract Administration, Vail, CO.

For further information on civilian courses, please contact the institution offering the course. The addresses appear in the February 1991 issue of *The Army Lawyer*.

4. Mandatory Continuing Legal Education Jurisdictions and Reporting Dates

<u>Jurisdiction</u>	<u>Reporting Month</u>
Alabama	31 January annually
Arkansas	30 June annually
Colorado	31 January annually
Delaware	On or before 31 July annually every other year
Florida	Assigned monthly deadlines every three years
Georgia	31 January annually
Idaho	1 March every third anniversary of admission
Indiana	1 October annually
Iowa	1 March annually
Kansas	1 July annually
Kentucky	30 days following completion of course
Louisiana	31 January annually
Minnesota	30 June every third year
Mississippi	31 December annually
Missouri	30 June annually
Montana	1 April annually
Nevada	15 January annually

New Jersey 12-month period commencing on first anniversary of bar exam

New Mexico For members admitted prior to 1 January 1990 the initial reporting year shall be the year ending September 30, 1990. Every such member shall receive credit for carryover credit for 1988 and for approved programs attended in the period 1 January 1989 through 30 September 1990. For members admitted on or after 1 January 1990, the initial reporting year shall be the first full reporting year following the date of admission.

North Carolina 12 hours annually

North Dakota 1 February in three-year intervals

Ohio 24 hours every two years

Oklahoma On or before 15 February annually

Oregon Beginning 1 January 1988 in three-year intervals

South Carolina 10 January annually

Tennessee 31 January annually

Texas Birth month annually

Utah 31 December of 2d year of admission

Vermont 1 June every other year

Virginia 30 June annually

Washington 31 January annually

West Virginia 30 June annually

Wisconsin 31 December in even or odd years depending on admission

Wyoming 1 March annually

For addresses and detailed information, see the January 1991 issue of *The Army Lawyer*.

Current Material of Interest

1. TJAGSA Materials Available Through Defense Technical Information Center

Each year, TJAGSA publishes deskbooks and materials to support resident instruction. Much of this material is useful to judge advocates and government civilian attorneys who are not able to attend courses in their practice areas. The School receives many requests each year for these materials. However, because outside distribution of these materials is not within the School's mission, TJAGSA does not have the resources to provide publications to individual requestors.

To provide another avenue of availability, the Defense Technical Information Center (DTIC) makes some of this material available to government users. An office may obtain this material in two ways. The first way is to get it through a user library on the installation. Most technical and school libraries are DTIC "users." If they are "school" libraries, they may be free users. The second way is for the office or organization to become a government user. Government agency users pay five dollars per hard copy for reports of 1-100 pages and seven cents for each additional page over 100, or ninety-five cents per

fiche copy. Overseas users may obtain one copy of a report at no charge. Practitioners may request the necessary information and forms to become registered as a user from: Defense Technical Information Center, Cameron Station, Alexandria, VA 22314-6145, telephone (703) 274-7633, AUTOVON 284-7633.

Once registered, an office or other organization may open a deposit account with the National Technical Information Service to facilitate ordering materials. DTIC will provide information concerning this procedure when a practitioner submits a request for user status.

DTIC provides users biweekly and cumulative indices. DTIC classifies these indices as a single confidential document, and mails them only to those DTIC users whose organizations have a facility clearance. This will not affect the ability of organizations to become DTIC users, nor will it affect the ordering of TJAGSA publications through DTIC. All TJAGSA publications are unclassified and *The Army Lawyer* will publish the relevant ordering information, such as DTIC numbers and titles. The following TJAGSA publications are available through DTIC. The nine character identifier beginning with the letters AD are numbers assigned by DTIC; users must cite them when ordering publications.

Contract Law

- AD B100211 Contract Law Seminar Problems/JAGS-ADK-86-1 (65 pgs).
- AD A229148 Government Contract Law Deskbook Vol 1/ADK-CAC-1-90-1 (194 pgs).
- AD A229149 Government Contract Law Deskbook, Vol 2/ADK-CAC-1-90-2 (213 pgs).
- AD B144679 Fiscal Law Course Deskbook/JA-506-90 (270 pgs).

Legal Assistance

- AD B092128 USAREUR Legal Assistance Handbook/JAGS-ADA-85-5 (315 pgs).
- AD B136218 Legal Assistance Office Administration Guide/JAGS-ADA-89-1 (195 pgs).
- AD B135492 Legal Assistance Consumer Law Guide/JAGS-ADA-89-3 (609 pgs).
- AD B141421 Legal Assistance Attorney's Federal Income Tax Guide/JA-266-90 (230 pgs).
- AD B147096 Legal Assistance Guide: Office Directory/JA-267-90 (178 pgs).
- AD A226159 Model Tax Assistance Program/JA-275-90 (101 pgs).
- AD B147389 Legal Assistance Guide: Notarial/JA-268-90 (134 pgs).

- AD B147390 Legal Assistance Guide: Real Property/JA-261-90 (294 pgs).
- AD A228272 Legal Assistance: Preventive Law Series/JA-276-90 (200 pgs).
- AD A229781 Legal Assistance Guide: Family Law/ACIL-ST-263-90 (711 pgs).
- *AD 230618 Legal Assistance Guide: Soldiers' and Sailors' Civil Relief Act/JA-260-91 (73 pgs).
- *AD 230991 Legal Assistance Guide: Wills/JA-262-90 (488 pgs).

Administrative and Civil Law

- AD B139524 Government Information Practices/JAGS-ADA-89-6 (416 pgs).
- AD B139522 Defensive Federal Litigation/JAGS-ADA-89-7 (862 pgs).
- AD B145359 Reports of Survey and Line of Duty Determinations/ACIL-ST-231-90 (79 pgs).
- AD A199644 The Staff Judge Advocate Officer Manager's Handbook/ACIL-ST-290.
- AD B145704 AR 15-6 Investigations: Programmed Instruction/JA-281-90 (48 pgs).

Labor Law

- AD B145934 The Law of Federal Labor-Management Relations/JA-211-90 (433 pgs).
- AD B145705 Law of Federal Employment/ACIL-ST-210-90 (458 pgs).

Developments, Doctrine & Literature

- AD B124193 Military Citation/JAGS-DD-88-1 (37 pgs).

Criminal Law

- AD B100212 Reserve Component Criminal Law PEs/JAGS-ADC-86-1 (88 pgs).
- AD B135506 Criminal Law Deskbook Crimes & Defenses/JAGS-ADC-89-1 (205 pgs).
- AD B135459 Senior Officers Legal Orientation/JAGS-ADC-89-2 (225 pgs).
- AD B137070 Criminal Law, Unauthorized Absences/JAGS-ADC-89-3 (87 pgs).
- AD B140529 Criminal Law, Nonjudicial Punishment/JAGS-ADC-89-4 (43 pgs).
- AD B140543 Trial Counsel & Defense Counsel Handbook/JAGS-ADC-90-6 (469 pgs).

Reserve Affairs

AD B136361 Reserve Component JAGC Personnel Policies Handbook/JAGS-GRA-89-1 (188 pgs).

The following CID publication is also available through DTIC:

AD A145966 USACIDC Pam 195-8, Criminal Investigations, Violation of the USC in Economic Crime Investigations (250 pgs).

Those ordering publications are reminded that they are for government use only.

*Indicates new publication or revised edition.

2. Regulations & Pamphlets

Listed below are new publications and changes to existing publications.

Number	Title	Date
AR 37-104-3	Financial Administration: Military Pay and Allowance Procedure (JUMPS-Army), Interim Change 102	7 Dec 90
AR 37-104-3	Financial Administration: Military Pay and Allowance Procedure (JUMPS-Army), Interim Change 103	11 Dec 90
AR 190-8	Military Police, Interim Change 101	23 Jan 91
JFTR	Joint Federal Travel Regulations, Uniformed Services, Change 49	1 Jan 91
JFTR	Joint Federal Travel Regulations, DOD Civilian Personnel, Change 304	1 Feb 91

3. OTJAG Bulletin Board System

Numerous TJAGSA publications are available on the OTJAG Bulletin Board System (OTJAG BBS). Users can sign on the OTJAG BBS by dialing (703) 693-4143 with the following telecommunications configuration: 2400 baud; parity-none; 8 bits; 1 stop bit; full duplex; Xon/Xoff supported; VT100 terminal emulation. Once logged on, the system will greet the user with an opening menu. Members need only answer the prompts to call up and download desired publications. The system will ask new users to answer several questions and will then instruct them that they can use the OTJAG BBS after they receive membership confirmation, which takes approximately forty-eight hours. The Army Lawyer will publish information on new publications and materials as they become available through the OTJAG BBS. Following is a list of TJAGSA publications that currently are available on the OTJAG BBS.

OTJAG BBS—TJAGSA PUBLICATIONS

Filename	Title
121CAC.ZIP	The April 1990 Contract Law Deskbook from the 121st Contract Attorneys Course
1990YIR.ZIP	1990 Contract Law Year in Review in ASCII format. It was originally provided at the 1991 Government Contract Law Symposium at TJAGSA
330XALL.ZIP	JA 330, Nonjudicial Punishment Programmed Instruction, TJAGSA Criminal Law Division
ALAW.ZIP	Army Lawyer and Military Law Review Database in ENABLE 2.15. Updated through 1989 Army Lawyer Index. It includes a menu system and an explanatory memorandum, ARLAWMEM.WPF
CCLR.ZIP	Contract Claims, Litigation, & Remedies
FISCALBK.ZIP	The November 1990 Fiscal Law Deskbook from the Contract Law Division, TJAGSA
FISCALBK.ZIP	May 1990 Fiscal Law Course Deskbook in ASCII format
JA200A.ZIP	Defensive Federal Litigation 1
JA200B.ZIP	Defensive Federal Litigation 2
JA210A.ZIP	Law of Federal Employment 1
JA210B.ZIP	Law of Federal Employment 2
JA231.ZIP	Reports of Survey & Line of Duty Determinations Programmed Instruction.
JA235.ZIP	Government Information Practices
JA240PT1.ZIP	Claims—Programmed Text 1
JA240PT2.ZIP	Claims—Programmed Text 2
JA241.ZIP	Federal Tort Claims Act
JA260.ZIP	Soldiers' & Sailors' Civil Relief Act
JA261.ZIP	Legal Assistance Real Property Guide
JA262.ZIP	Legal Assistance Wills Guide
JA263A.ZIP	Legal Assistance Family Law 1
JA265A.ZIP	Legal Assistance Consumer Law Guide 1
JA265B.ZIP	Legal Assistance Consumer Law Guide 2
JA265C.ZIP	Legal Assistance Consumer Law Guide 3
JA266.ZIP	Legal Assistance Attorney's Federal Income Tax Supplement

JA267.ZIP	Army Legal Assistance Information Directory
JA268.ZIP	Legal Assistance Notorial Guide
JA269.ZIP	Federal Tax Information Series
JA271.ZIP	Legal Assistance Office Administration
JA272.ZIP	Legal Assistance Deployment Guide
JA281.ZIP	AR 15-6 Investigations
JA285A.ZIP	Senior Officer's Legal Orientation 1
JA285B.ZIP	Senior Officer's Legal Orientation 2
JA290.ZIP	SJA Office Manager's Handbook
JA296A.ZIP	Administrative & Civil Law Handbook 1
JA296B.ZIP	Administrative & Civil Law Handbook 2
JA296C.ZIP	Administrative & Civil Law Handbook 3
JA296D.ZIP	Administrative & Civil Law Deskbook 4
JA296F.ARC	Administrative & Civil Law Deskbook 6
YIR89.ZIP	Contract Law Year in Review—1989

4. TJAGSA Information Management Items

a. Each member of the staff and faculty at The Judge Advocate General's School (TJAGSA) has access to the Defense Data Network (DDN) for electronic mail (e-mail). To pass information to someone at TJAGSA, or to obtain an e-mail address for someone at TJAGSA, a DDN user should send an e-mail message to:

"postmaster@jags2.jag.virginia.edu"

The TJAGSA Automation Management Officer also is compiling a list of JAG Corps e-mail addresses. If you have an account accessible through either DDN or PROFS (TRADOC system) please send a message containing your e-mail address to the postmaster address for DDN, or to "crank(lee)" for PROFS.

b. Personnel desiring to reach someone at TJAGSA via AUTOVON should dial 274-7115 to get the TJAGSA receptionist; then ask for the extension of the office you wish to reach.

c. Personnel having access to FTS 2000 can reach TJAGSA by dialing 924-6300 for the receptionist or 924-6- plus the three-digit extension you want to reach.

d. The Judge Advocate General's School also has a toll-free telephone number. To call TJAGSA, dial 1-800-552-3978.

5. The Army Law Library System.

With the closure and realignment of many Army installations, The Army Law Library System (ALLS) has become the point of contact for redistribution of materials contained in law libraries on those installations. *The Army Lawyer* will continue to publish lists of law library materials made available as a result of base closures. Law librarians having resources available for redistribution should contact Ms. Helena Daidone, JALS-DDS, The Judge Advocate General's School, U.S. Army, Charlottesville, VA 22903-1781. Telephone numbers are Autovon 274-7115 ext. 394, commercial (804) 972-6394, or fax (804) 972-6386.

6. Literature and Publications Office Items.

a. The School currently has a large inventory of back issues of *The Army Lawyer* and the *Military Law Review*. Practitioners who desire back issues of either of these publications should send a request to Ms. Eva Skinner, JAGS-DDL, The Judge Advocate General's School, Charlottesville, VA 22903-1781. Not all issues are available and some are in limited quantities. Accordingly, we will fill requests in the order that they arrive by mail.

b. Volume 131 of the *Military Law Review* encountered shipping problems. If you have not received it, please write to Ms. Eva Skinner, JAGS-DDL, The Judge Advocate General's School, Charlottesville, VA 22903-1781.

By Order of the Secretary of the Army:

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